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OVERSIGHT OF THE OFFICE OF MANAGEMENT AND BUDGET REGULATORY REVIEW AND PLANNING PROCESS

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTERGOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

JANUARY 28, 1986

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OVERSIGHT OF THE OFFICE OF MANAGEMENT AND BUDGET REGULATORY REVIEW AND PLANNING PROCESS

TUESDAY, JANUARY 28, 1986

U.S. SENATE,
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Dave Durenberger (chairman of the subcommittee) presiding.

Present: Senators Durenberger, Chiles, Gore, and Levin.

Senator DURENBERGER. The hearing will come to order.

Our first witness is Debbie Berkowitz of the AFL-CIO.

TESTIMONY OF DEBORAH BERKOWITZ, DIRECTOR OF SAFETY AND HEALTH, FOOD AND ALLIED SERVICES TRADES DEPARTMENT, AFL-CIO

Ms. BERKOWITZ. We have prepared a tape for you to show just how devastating grain dust explosions can be, and the kind of devastation that numbers just don't convey. Just by way of explanation for all of you who don't know, grain dust is the byproduct of processing corn, wheat, and other types of grain through a grain elevator which is a storage facility. Grain dust is nine times as explosive as coal dust. Pound for pound, it is as explosive as TNT.

This year alone, in 1985, there have been 23 grain dust explosions that have left five dead and scores injured. We have prepared this tape for you, which I will narrate, to show you.

What you are seeing is an explosion a year ago, in September 1984, in Knoxville, TN. It was a small grain elevator that exploded. The flames leaped across to a feed mill. It is a grain elevator that you are seeing there. There were three killed, and four seriously burned. The explosion destroyed the feed mill, leaving over 50 people out of work. OSHA's conclusion, when they did an investigation of what caused the explosion, there were dangerous amounts of grain dust left in the elevator.

A farmers' co-op elevator, a year later, November 2, 1984, a small grain elevator was ripped by an explosion, three killed, four seriously burned. It happened during the corn harvest, therefore, it destroyed the economic base for this small community. OSHA's finding, dangerous amounts of grain dust caused this explosion.

This is an explosion in another small elevator in Hartland, MN.

This is Lake Lillian, MN, an explosion last year, in 1984, left two dead and four injured. This is a feed mill that exploded.

To show you that grain elevator explosions occur not only in small elevators in rural areas, but also in large elevators—this tape, if you have a week stomach, you probably should not watch it. This is an explosion that occurred in April 1981 in a huge export elevator in Corpus Christi, TX.

The elevator exploded and destroyed half of the elevator. On top there, where you see all of the charcoal, this is where about 50 people were working. That is the top of the grain elevator where people work. Nine people were killed, and 30 were critically burned. OSHA's finding was that the dust control system let the dust build up in the elevator, and that is what caused the explosion, and it caused $30 million in damages.

Senator DURENBERGER. Debbie, before you finish your testimony, let me just explain why we suggested that you begin your testimony with that film.

Carl Levin and I have been at this regulatory review business, one way or another, since we got here in 1978 and began our work in 1979. The frustrating thing for us, I think, all along has been the notion that this is one of those boring subjects that deserves nothing better than the Federal Report section of the Washington Post. Since both of us came from somewhere else to Washington, I think we understood as well as anybody that the whole issue of regulatory review is all about people.

This is what this hearing is all about, and that is why we introduced the subject in that way. This is not a political game. It is not a paper chase. It is not limited to inside the Beltway or the Federal Report section of the Washington Post. Particularly, it is not a victimless crime, because in this case the victims of the inappropriate use of the regulatory process are never politicians or bureaucrats; rather, they are American citizens whose water we allow to be polluted, and whose civil and human rights we allow to be violated, and whose lives, as you can tell by this film, we put at risk. Government gets to sit on its hands, and sometimes just look at films, and then look the other way while these things continue to happen.

I have a formal opening statement on this subject, which I will make later. Jim Miller called me during breakfast and said that he is helping the President charge up the bipartisan leadership this morning, and he hopes that he will be here by 10:20 or so, but then he will have to leave by 11:20 or 11:30 to brief the networks on the state of the Union as seen from the Office of Management and Budget.

With that, Carl, I don't know if you want to open now, or wait until we finish the panel for your opening statement because I would like to let Ms. Berkowitz finish her statement, and Larry Jackson his.

Senator LEVIN. Mr. Chairman, if you are going to make your opening statement later, I will withhold mine at this time as well. I do want to echo your comments about the importance of these hearings. These are obviously life and death issues. The identity of the persons who have been making these decisions has been hidden from the public. OMB's role in this whole rulemaking process has been hidden. We have made efforts over the years to try to bring this to public light so that people will be accountable for those decisions, but we have so far not succeeded, and OMB has not complied with what is obviously strong signals coming from the public and from the Congress.

I will have more to say about this with my opening statement later. I look forward to asking questions of these witnesses, and I want to commend them for the efforts that they have made over the years to try to get this situation corrected—so that we can focus accountability where it belongs, in the agencies, and maintain the protections to the public that we have written into law, with regulations open to public comments and a clear identification of the decisionmaker.

I want to commend you, Mr. Chairman, for putting these hearings together and for your continuous effort and support to try to focus accountability for regulation in this country.

Senator DURENBERGER. Thank you, Carl.

Ms. Berkowitz, why don't you proceed.

Ms. BERKOWITZ. Mr. Chairman, thank you for the opportunity to appear here today. I am going to give a brief statement, not the prepared written statement that I have.

For 6 years, OSHA has been working on a safety standard to prevent grain dust explosions, and for 6 years OMB has blocked any attempt by OSHA to publish such a standard and protect the lives of working people in grain elevators and mills. As you said, the costs of OMB's actions have been high.

In the past 6 years, 132 elevators and mills have exploded, resulting in 49 deaths, 230 injuries, hundreds out of work, and the economic bases of many small communities destroyed.

OMB started to block the grain dust standard in late 1980, 2 years before OSHA had even proposed one. That was in December 1980, when David Stockman wrote in the Washington Post that one regulation he wanted to block, when assuming the directorship of OMB, was any rule to control explosive grain dust. This was 2 years before OSHA even proposed such a regulation, and this was the first time that it was clear that OMB would block this regulation, not out of evidence, but out of the dictates of ideology.

Then in 1982, the National Academy of Sciences published a report on preventing dust explosions. They concluded that dust accumulations greater than one/sixty-fourth of an inch can trigger these devastating explosions. Soon after its publication, the head of the Academy team that wrote the report testified that 80 percent of the Nation's grain elevators have conditions ripe for major explosions.

Following this report, and testimony, OSHA wrote a grain dust proposal. In early 1983, after spending 10 months soliciting comments on this proposal from all parties, OSHA sent the proposal to OMB for review. OMB did not review the standard in its allotted time of 60 days, instead it extended its review for 8 months, finally forcing OSHA to significantly weaken the proposal in order to get it published.

The extended OMB review resulted from a series of private meetings between OMB and certain parties interested in maintaining the status quo. These meetings took place after OSHA had already obtained the views of these parties, and these were private meetings.

At the insistence of OMB, its review of the grain elevator safety standard was conducted in a secretive fashion. OMB insisted that a bare minimum of documents be exchanged between it and OSHA, and that no notes be kept of meetings. At various stages, OMB officials would telephone their positions on the proposal to OSHA so that nothing be in writing. In fact, in one instance, rather than present a 27-page written rebuttal from OSHA to OMB, OSHA itself orally transmitted the information to OMB at OMB's insistence.

Though OMB had no safety engineers, health professionals, or occupational health specialists working on this review, they succeeded in getting OSHA to significantly weaken their proposal, if not destroy it. OMB forced OSHA to change the proposal because they said that it would cost too much for smaller elevators. Do you know what OMB decided was costing too much? Sweeping! All that OSHA said that smaller elevators would have to do is increase sweeping, but for OMB, this was too much. This was too much for an agency that was bent on undermining the right of American workers not to be killed on the job.

OMB's role in this rulemaking did not end with the changed proposal. The staff at OSHA is so terrified of an OMB rejection of their final standard that they have tailored it to make sure it will be accepted. I have seen a copy of the draft final standard circulating in the agency, it will have exempted, of the total 11,200 elevators in the United States, 10,415 from dust control provisions. This way, the rule will pass OMB, it will give the appearance that OSHA is carrying out its mandate, it just won't cover anybody or protect anybody. Most of the explosions that you saw on this tape, except for the larger one, were in elevators less than 1 million bushels, they would not have been covered by this proposal.

There is a high cost in letting OMB be the final and only word in the rulemaking process. Mr. Jackson will discuss with you what these costs are and what it means.

Thank you.

Senator DURENBERGER. Thank you, Debbie. Your full statement will be made part of the record.

I neglected to identify you. I guess I have had the pleasure of listening to your testimony so often that I didn't identify you for the others in the room as the director of safety and health of the Food and Allied Services Trades Department at the AFL–CIO. With you is Larry Jackson, who is general secretary/treasurer of the American Federation of Grain Millers International, a union which happens to have its headquarters in Minnesota. The union represents a membership of 30,000 grain elevator and mill workers nationwide.

Since 1977, Larry has chaired the Constitution and Law Committee of the international union. He serves on the executive board of the Maritime Trades Department of the AFL–CIO, is an executive board member of the AFL–CIO's Food and Allied Services Trades Department, and is a member of the Secretary/Treasurers Conference of the AFL–CIO.

Larry, we welcome you, and your full statement will be made a part of the record as well.

TESTIMONY OF LARRY JACKSON, SECRETARY/TREASURER, INTERNATIONAL UNION OF THE AMERICAN FEDERATION OF GRAIN MILLERS

Mr. Jackson. Thank you, Mr. Chairman, and good morning.

I represent the American Federation of Grain Millers, a union representing 25,000 workers in the grain storage and processing trades.

I am always amazed at the ease with which the so-called economic watchdogs conjure up their economically good reasons to strip away the legislatively guaranteed rights of working men and women in this country to a safe and healthful workplace. I am equally amazed at how these prophets of efficiency rarely consider that by refusing to protect working people, they are callously condoning and maybe even responsible for weakening the economic viability, if not destroying the economic base, of small towns, dependent on a safe and healthy industry.

In my own home State of Minnesota, where the grain industry is the underlying base for many small farm towns, and the key industry in our big cities, we have seen our share of devastation. Since 1980, the year that the Office of Management and Budget first gave a thumbs down signal to OSHA on the prospect of a grain safety standard, designed to protect these tragic explosions, grain dust explosions have riped through 12 facilities in Minnesota, leaving 7 dead and 37 seriously injured. The bulk of the explosions in Minnesota were in small feed mills and elevators which were located in farming towns at Darwin, Comstock, Hendricks, and Lake Lillian.

It is not only the small towns that can be hurt. Last year, in the city of Knoxville, TN, a small elevator and feed mill complex were destroyed by a devastating grain dust explosion that left 3 dead and 11 injured. It threw over 20 people out of work for good because the mill never reopened.

To the OMB, these are just numbers, but in reality these were widows, orphans, and over 23 families left without a livelihood. The most tragic aspect of the explosion is that during the OSHA investigation into the cause, the high level of grain dust was found to be the culprit. Had the standard OSHA wanted been in place, Mr. Chairman, the standard that would have mandated the grain dust levels be controlled, this tragedy may have been prevented.

In my experience, the arguments that the OMB has put forth to block an effective grain dust standard from being implemented bear little resemblance to the realities facing this Nation's 200,000 grain elevator and mill workers. OMB states that grain elevator workers can command higher wages because they work in a higher risk workplace. Supposedly, then, this gives the elevator owners enormous incentives to clean up their elevators and to make them safer, or else they will have to pay even higher wages. Therefore, an OSHA standard is unnecessary.

Even more, in figuring out the costs or benefits of any grain safety standard, OMB assumes that the grain workers value their lives less because they work in a dangerous industry, therefore, their lives are worthless. That may sound good over a cup of coffee in the new executive building, but it won't play in the real world.

In my view, Mr. Chairman, there can be no debate regarding the pain and misery that result from the searing of human flesh and the enormous emotional and physical consequences which result from such injury. We cannot sit idly by and watch the sterile debate conducted by OMB result in further deaths and destruction.

Had the small town of Marion, SD, known that to spend $1,500 or even $10,000 over a few years would have saved their elevator and their harvest, would they have spent it? Why are the economists at OMB making a decision and opting for devastation rather than safety. Why have they been allowed to take over the role that Congress assigned to OSHA? The consequences of letting OMB review be final, and the only word can only spell disaster for our Nation's grain workers.

Mr. Chairman, distinguished members of the subcommittee, I thank you for this opportunity.

Senator DURENBERGER. Thank you very much.

Let me ask both of you—maybe you will come at this from different sides—but the bothersome thing when you look at this and when you read through some of the memoranda relates to putting values on life. Larry, you said something about people making choices that put their lives at risk, and there are certain assumptions. They made the choice, they bear the risk.

It suggests to me, as I look at this debate over the value of life, that it is the fundamental debate going on in this country right now—over liability, professional liability, product liability, and a lot of other things. A few courts are putting certain value on certain lives, and all of a sudden the whole system seems to have gone haywire. And nobody can be protected against the consequences of life-taking risk.

So maybe this is the forerunner of a larger debate in the country; and maybe there is some policy sneaking up on us from the administration, through OMB, that is going to try to put a fixed value, if you will, on life. Maybe there is a plan here to do that to all of us, and then convert the while system throughout the country: you die at a certain age, you get so many dollars, for forgetting about negligence and a lot of other things.

I am not sure whether that is what is going on, or whether it is one side of the old debate, that the agencies are putting people out of business with the regulations. The flip side of that is, OMB is going to make sure that the agencies survive but at the risk of people's lives.

What is going on? What is the nature of this debate over the value of life? Is OMB so callous as to be saying, in effect, that there are only so many dollars to be earned in a grain miller's life, and if he chooses to give that life away by signing up to work at the elevator in Hartland for x number of dollars, that is his tough luck? How do I interpret that?

Mr. JACKSON. If I could, Mr. Chairman, comment at least on part of your question. It appears to me that the OMB has a different outlook on what the real world in fact is. In these small communities that we make reference to, these people don't have a great selection of employment, and they have to go where the work is. They take a job there, and even though companies recognize, and the industry recognizes, that this is a dangerous facility, the implementation of teaching people to respect where they are working does not work out. It is not carried out in many cases.

I wish I knew what OMB is trying to do. I have testified in hearings in Kansas City, and in Minneapolis over the last 5 years. OSHA has attempted to established a reasonable standard, and when it was turned over to OMB, then they sat on it for 6 months. I don't know what they are trying to do, or what they are attempting to do.

Senator DURENBERGER. Debbie, what about you, you were a little more specific in your condemnation of them.

Ms. BERKOWITZ. Two things. The first thing is, one of the things that OMB is doing is something called the cost/benefit analysis, and that is why they have to come up with what the benefit of a life is, to weigh it against the cost of a standard.

In terms of occupational safety and health standards, not only does the statute implicitly place a value on life, but the courts have prohibited a cost/benefit analysis when it comes to that standard and these kinds of rules. I think that what OMB is doing is using the cost of the standard and, therefore, benefits as almost a ruse to get their ideology, which is not to put a priority on safety and health, into effect.

I think that they are starting to focus the debate on economics as a guise or as a front to their philosophy, which is safety and health is just not a priority, trying to sort of undermine OSHA's mandate.

One of the things that I wanted to share with you is that I spent 6 years of my life with Larry's members, educating them and training them about how grain dust is explosive, and how to work for safer conditions within their own union contracts. I have to tell you that 80 percent of these people had no idea that grain dust was explosive, none of them knew that explosions could occur, or if they did, they thought, it is not going to happen to me because you don't hear about these things on the evening news.

How many of you know that there was an explosion 2 months ago in Baltimore at the Central Soya Elevators, a small explosion that killed one man and left one man critically injured? These things just don't make the news.

So for OMB to say that these people value their lives less because they work in a high risk job, they don't know that.

The other thing is that unless they are in a union shop, they don't make high wages. They make $4.00 an hour, or $4.50 an hour, which is not high wages. So it is not like they are trading wages now for their life.

Senator DURENBERGER. Carl, let me yield to you at this point. Do you want to make your opening statement now, or later?

Senator LEVIN. I will wait also, as you are, Mr. Chairman, for Mr. Miller to get here.

You have provided to the committee some documents which appear in the OSHA files. One of those documents is a summary of grain elevator issues, it is a 1-page document, which contains the comments of the OMB, as I understand it, to OSHA. Somebody took OSHA's notes, typed them up into this 1-page document. Is that true?

Ms. **Berkowitz**. That is true.

Senator **Levin**. I would like this document to be made part of the record, Mr. Chairman.

Senator **Durenberger**. Without objection, it will be.

[The information referred to follows:]

OMB Objections to Proposed OSHA Standard

Typed from hand written copy

[illegible]
Reardon
[illegible]
[illegible]
the
fire
Standard

SUMMARY OF GRAIN ELEVATOR ISSUES

1. Regulatory impact analysis methodology. The RIA appears to contain a number of biases which tend to overstate risks (e.g., explosion and fire sample). It also appears to contain arbitrary assumptions for which the bias is unknown as well as high effectiveness assumptions.

2. Dust control provision. The 1/8 inch dust level is unsupported and apparently arbitrary and there is no demonstrably acceptable way to measure the dust. Tables contained at pages E-21 and G-3 of volume 2 of the Arthur D. Little study indicate that the costs of dust control greatly exceed benefits.

3. Burden on small business. The regulation appears that it would disproportionately affect small businesses (see table at p. G-54 of volume 2 of the Arthur D. Little study). The evidence presented in OSHA's regulatory flexibility analysis does not appear to justify OSHA's conclusion that no problem exists.

4. Coverage of other industry segments. The regulation covers several activities including milling activity in addition to grain elevators. Insufficient evidence is presented of serious risk in these activities or that the regulation can achieve a significant reduction of risk in these activities.

5. Other provisions. A number of other provisions appear to have questionable effectiveness and would appear to disproportionately impact small businesses. These include: inspection door retrofit, emergency egress, grain dryer provisions, grate openings and certain bin-entry provisions.

6. Exemptions. The rule does not provide for exemptions for new technologies where the creation of dust is retarded. An example would be an oil treatment process eliminating dust.

7. Need for regulation. The rule was created under the assumption that risk levels of earlier years are still present. Considerable evidence exists that industry has adopted safer practices. This makes the need for regulation in this area questionable.

Senator **Levin**. This document has seven points that OMB made on the phone, apparently, to OSHA. Do you know how this document got into the OSHA files by the way?

Ms. **Berkowitz**. Yes; when the rule went over to OMB, OMB refused to put anything in writing to OSHA about why it was holding it up. They called in their comments to OSHA, and an OSHA staff person wrote down the comments because they would have to then respond to them.

There was a number of people at the agency who were very concerned about OMB's rule. This piece of paper was leaked out of OSHA. There was an exchange in a men's room between a staff of the House and some OSHA staff people to leak this out. It was typed up and released to the Washington Post.

Senator **Levin**. So that this was not put into the file by OSHA, was it?

Ms. **Berkowitz**. No, it wasn't. We asked OSHA, and the Congress asked OSHA to put it into the file. Finally, when it wasn't, 6 months after the rule began, I put it into the file.

Senator **Levin**. You actually dropped this piece of paper into the rulemaking file.

Ms. **Berkowitz**. Yes.

Senator **Levin**. If it is still there, it is because you put it there.

Ms. **Berkowitz**. Yes.

Senator **Levin**. We have tried to find a number of files at OMB on this subject, and we can't find files. I presume that it is still there at OSHA. Assuming that it is still there, it is because you put it there.

Ms. **Berkowitz**. Right.

Senator **Levin**. For no other reason.

Are these comments substantive in your judgment?

Ms. **Berkowitz**. No, they are philosophical. OMB had met with industry, who just said that the standard wouldn't work and it is too expensive. I feel that OMB was sort of grasping at straws, saying that the OSHA standard was arbitrary, it was capricious. You have to remember that OSHA spent 6 years on this standard. The National Academy of Sciences wrote a report defining how explosions could be prevented, and you have OMB coming back to OSHA saying that they don't know how to prevent explosions, but OMB does, and asking all sorts of questions.

Senator **Levin**. For instance, OMB told OSHA on the phone that the ⅛th inch dust level is unsupported and apparently arbitrary. That is a pretty significant comment, isn't it, to be made by OMB to OSHA?

Ms. **Berkowitz**. That is true, especially since, when the National Academy of Sciences wrote the report on how to prevent explosions, they said: All you need is one-sixty-fourth of an inch of dust to sustain an explosion. The one-eighth inch came out because the industry essentially balked at one-sixty-fourth inch and said that it is not feasible.

The agency, by statute, has to determine that the standard is economically feasible before they even give it to OMB. They worked out a compromise between the industry, they thought, and the unions, and the experts that one-eighth inch, which is eight times higher than what is really the safest level, would be a good compromise. It is also the standard that Canada uses in its grain elevators, and also the standard that many insurance companies use.

Senator **Levin**. When you read through the summary, there is no doubt in your mind, and we can go through them, that these are significant comments, which have an impact on the rule. Is that true?

It says here:

> The RIA appears to contain a number of biases which tend to overstate the risks. The ⅛th inch dust level is unsupported and apparently arbitrary. Regulation appears that it would disproportionately affect small businesses,

and so forth. These are significant comments.

Ms. **Berkowitz**. Yes.

Senator **Levin**. The history of this rule is that the comments, in fact, did change this rule.

Ms. **Berkowitz**. Yes. Whether they are valid or not, they did.

Senator **Levin**. So you have OMB involved in this process of negotiating this and insisting on changes in a very, very significant way. Is that clear?

Ms. **Berkowitz**. That is true.

Senator **Levin**. Yet there was no record of that until you came along and stuck something in the OSHA file.

Ms. **Berkowitz**. That is true.

Senator **Levin**. The public would not be aware of the fact that it is OMB that is making critical decisions on this regulation, rather than OSHA, unless something is in the file to tell the public who is making these decisions.

Ms. **Berkowitz**. That is true.

Senator **Levin**. So that the philosophy that is involved in the decisionmaking process here, and the choices which are made, is untested in effect, it is hidden. The effects of this philosophy are hidden because it looks as though OSHA is making these decisions instead of OMB.

I personally believe—first of all, I happen to disagree with OMB's philosophy on this particular rule. Substantively, I happen to disagree with them, but that is not the point. The point is that we should make sure that the decisionmakers are held accountable for their decisions, that is the critical issue, I believe.

Because OMB is working in the dark, and not in the daylight, because there is no requirement in the law that OMB's input be made public so that we know who is making these decisions. Right now the decisionmaker is not held accountable for his decisions. Would you agree with that?

Ms. **Berkowitz**. That is certainly true.

Senator **Levin**. I want OMB held accountable for what we saw today if, in fact, it is their input on these regulations which resulted in dust accumulating which led to explosions. I say, "if," I am not reaching a judgment on that. But I want decisionmakers held accountable for their decision, and that is what we don't have in this country right now, because OMB is, in effect, making these decisions.

They deny it, they say, "No, OSHA makes these decisions," but as a matter of fact, it is OMB on the telephone saying, these rules should be modified. That is what is lacking, as far as I am concerned, process-wise.

After OMB made their comments, which were written out by somebody at OSHA, and then someone else came along later and typed them up, it took an outsider, to wit you, thank God, to put them in the rulemaking file. OSHA then reviewed those comments of OMB. OSHA's review of those comments is a 27-page document; is that right?

Ms. **Berkowitz**. Yes, and it is a rebuttal of the comments.

Senator **Levin**. OSHA typed up a rebuttal to the OMB comments but didn't submit this to OMB. They called OMB, is that right?

Ms. **Berkowitz**. That is true, as far as I know.

Senator **Levin**. As far as we know, OMB asked them not to submit this in writing to the OMB, but instead to read it orally over the phone so that there wouldn't be any record as a matter of fact.

Ms. **Berkowitz**. That is true.

Senator **Levin**. So a 27-page document, as far as we know, is read over the phone verbatim to OMB just so there won't be any tracks.

Ms. **Berkowitz**. That is right.

Senator **Levin**. So this document doesn't appear in the rulemaking file at OMB, as far as we know, does it?

Ms. **Berkowitz**. No, not at all.

Senator **Levin**. At OSHA, it may appear.

Ms. **Berkowitz**. This was also given through various people sort of intercepting it to me, and I put that into the file.

Senator **Durenberger**. Do you want to identify that?

Senator **Levin**. It is a 27-page document entitled, "OSHA Review of Grain Elevator Issues." OSHA took these comments that are typed up now on one page, and reacted to them. The reaction over the telephone was, "Don't send it to us, My God, there could be a record of it."

Senator **Durenberger**. Do you want to make that part of the record?

Senator **Levin**. It is a long document, but I am happy to make it part of the record.

Senator **Durenberger**. Without objection, it will be made part of the record.

[The information referred to follows:]

OSHA REVIEW OF GRAIN ELEVATOR ISSUES

In response to concerns raised by the Office of Management and Budget (OMB), OSHA has re-examined several issues related to the proposed grain handling standard. These issues were: (1) whether the agency sufficiently explored the underlying need for regulation; (2) the cost-effectiveness of the options available to control grain hazards; and (3) the general accuracy of the cost and benefit estimates contained in OSHA's regulatory impact analysis (RIA) and the Arthur D. Little (ADL) report prepared under contract for OSHA. The Department has carefully reviewed both the substantive regulations and their economic underpinnings. This review reinforced our previous conclusion that the proposed standard is both necessary to protect workers exposed to grain dust and represents the "least costly" approach to effective control of these hazards. However, we believe that the estimates of compliance costs to industry are inflated and have taken steps to revise them. Our conclusions are briefly highlighted below; a more detailed response is attached.

At the outset, several points should be noted regarding the economic studies. First, the agency was dissatified with the technical quality of portions of the ADL report, in particular the study's flawed attempt to measure the cost-effectiveness of individual standard provisions and economic viability. For this reason, OSHA did not ignore contrary results, but neither did the agency adopt the ADL study wholesale in its regulatory impact analysis. Secondly, the Department believes that there is more than sufficient economic information at hand to support the proposal. OSHA has contracted with Booz-Allen to scrutinize the ADL study's methodology and estimates during the rulemaking. A preliminary review has been completed and Booz-Allen's initial reaction supports the overall validity of the benefit estimates, but points to some incorrect assumptions on the cost side.

Our basic conclusions are as follows:

- The estimates of the risks to workers in the grain handling and processing industries are not exaggerated.
- Dust control is the central measure in any comprehensive program to lower grain dust hazards.
    - The proposed 1/8-inch dust level is not arbitrary, but rather reflects the recommendations of respected industry groups.

-- Other alternatives would generally be either ineffective or more costly. An ambient air standard would require extensive monitoring and recordkeeping, which industry opposes. A pure performance standard would be difficult to enforce and would lead many employers to adopt the stricter 1/64-inch standard recommended by the National Academy of Sciences (NAS).

-- OMB's suggestion that the costs of dust control greatly exceed benefits is based on a seriously flawed methodology. The proposal's explosion-related controls as a group pass the cost-benefit test with high marks.

o The regulation would not disproportionately affect small business. The ADL cost estimates for country elevators are excessively high--by as much as 30 percent. Moreover, OMB's reference to profits as an indicator of small business burdens is inappropriate because it is not a meaningful measure to an industry dominated by cooperatives and vertically integrated firms controlled by larger export and inland terminals (95 percent of the country elevators fall under one of these categories).

o The available statistics provide support for the coverage of mills under the proposed standard. For example, incidences of explosions and fires appear to be equal to the rates experienced in the grain handling industry. Nevertheless, the proposal requests additional information and data on the proposed standard's scope regarding individual industries.

o A review of other questioned provisions indicates that they are necessary, cost-effective and will not unduly burden small business. In fact, many of these provisions have already been modified to ease requirements for small business.

o The proposed rule is performance-oriented to encourage innovation in dust control technology.

o Finally, the trend in accidents in the grain industry in recent years is up, not down.

-- In industries with explosion-related hazards, the number of fatalities will fluctuate year-to-year. OSHA believes that both high and low fatality years should properly be counted in determining risk levels, particularly since the purpose of regulation is to reduce the incidence of explosions. Averaging fatalities over time will tend to smooth out the risk profile.

-- OSHA believes that the 1976-1977 period of explosions that caused a heavy loss of life is not an aberration triggered by the one-time export of a large volume of grain to the Soviet Union, as witnessed by the recent grain deal. But even excluding the 1976-1977 period, explosion-related fatalities have more than doubled in recent years--3.9 deaths per year for the 1958-1975 period compared to 8.8 deaths per year for the 1978-1982 period. Injuries also jumped dramatically--from 21.8 to 41.6 over the same periods.

The reasoning behind each of these conclusions is described in greater detail in the attachment.

ATTACHMENT

1. Regulatory Impact Analysis Methodology To Estimate Risks

As previously noted, the regulatory impact analysis (RIA) was adapted from the Arthur D. Little study conducted under contract for OSHA. In order to estimate the proposed standard's benefits, it was first necessary to establish a baseline level of risk to workers and other personnel (*e.g.*, firefighters and inspectors) associated with grain handling and processing facilities. OSHA directed a comprehensive literature search to insure the best available baseline risk data.*

As is typically the case in the health and safety arena, there exists no single data source with which to estimate current risks for all affected industries. As a result, the analysis consolidated data from a variety of sources. Among the publications used most directly in establishing the baseline risk profiles were the following:

- *Prevention of Dust Explosions in Grain Elevators - An Achievable Goal*, *Office of the Special Coordinator for Grain Elevator* Safety, U.S. Department of Agriculture (January 1980).
- *Literature Investigation into the Dust Explosion Danger in Industries Storing and Processing Cereals and Flour*, H. de Gooijer, T. M. Groothuizen and M. E. Reinders (October 1975).

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* In all, the contractor's draft report (see chapter IV) indicates that over 50 different references were consulted in order to help establish both the baseline and the risk reduction levels. Other references canvassed (in addition to those used) include publications by the American Society of Agricultural Engineers, National Feed and Grain Association, National Safety Council, Occupational Safety and Health Administration, and several conferences (proceedings) relating to grain handling facilities.

- Literature Survey of Dust Explosions in Grain Handling Facilities: Causes and Prevention, Iowa State University (1978).
- Data from the Safety and Health Office, Federal Grain Inspection Service, U.S. Department of Agriculture.
- Accident Facts, 1977 and 1982 editions, National Safety Council, (1977 and 1982).
- Selected Occupational Fatalities Related to Grain Handling As Found in Reports of OSHA Fatalities/Catastrophies, Laves and Gatron, Occupational Safety and Health Administration, U.S. Department of Labor (1983).

While none of these data sources taken individually is sufficiently inclusive, OSHA was able to combine them using standard statistical techniques in a fashion that provides a good picture of the aggregate risk levels currently existing in the industry. In the process, no attempt was made to overstate the risks. OSHA's method of data compilation on the record of fires and explosions in the industry, which OMB criticizes, is illustrative. The contractor made a careful event-by-event comparison of the explosions listed in the USDA and National Fire Protection Association's (NFPA) fire incident data. This comparison produced 26 additional explosions not found in the USDA data, the primary data source on grain handling explosions. Simple addition of the 26 explosions to those in the USDA data seems unobjectionable. If any bias exists, it is probably on the downside as only fragmentary data exist on explosion hazards in oilseed and grain processing plants. Furthermore, by incorporating data from multiple sources, OSHA lowered the probability that any biases which may be inherent in individual data sources would influence its analytical results.

Following the establishment of a baseline risk profile, the ADL study estimated the likely reductions in risk due to OSHA's regulatory provisions. The first step in this process was to estimate the frequency with which various causal factors lead to hazardous events, using data taken from the above sources. ADL next used National Academy of Science's Materials Advisory Board data on the efficiency of controlling various hazards to assign an effectiveness rating to the control of various causal factors by OSHA's standards. This procedure produced aggregate estimates of a 70.5 percent reduction in explosion-related risks and a 73.5 percent reduction in fire-related risks.

While we have serious problems with the apportioning of the total risk reduction among individual standard provisions (see discussion below under response to Question 2), we believe that the aggregate reductions present a reasonable picture of the likely extent of risk reduction as a result of our regulation. If there is any bias, it is probably that the ADL estimate that only 70 percent of explosions will be prevented is too conservative, because where spark prevention actions fail, low dust levels would not provide adequate fuel for ignition.

In sum, the assumptions made were not arbitrary, nor does the data base overstate risks or risk reductions due to biases introduced during the conduct of the analysis.

2. Dust Control Provision and Alternatives to the One-Eighth Inch Dust Level

Interested parties raised several alternatives to the 1/8-inch dust level, which included (1) raising the level to 1/4-inch, (2) replacing the 1/8-inch level with an ambient air standard, (3) substituting a broadly written performance standard, or (4) eliminating dust control requirements altogether. Upon close examination, none of these alternatives proved to be acceptable.

Raising the level to 1/4-inch could not be justified based on available data. The report of the National Grain and Feed Association notes that the dangers of explosion exist at grain dust levels as low as 1/100 of an inch. The National Academy of Sciences recommended that the level be set at 1/64-inch. For reasons of economic feasibility, OSHA proposed to set a higher 1/8 of an inch action level.

However, the 1/8-inch level is not arbitrary; it is, in fact, a well known number. No industry representative challenged this number as being either "pulled out of the air" or for that matter as being too low. To the contrary, the 1/8-inch level had been selected by Factory Mutual (a major elevator insurer) and by a Canadian Grain Handling Association study prepared for the Canadian Government* as the maximium level of grain dust allowable in grain handling facilities. On the other hand, no scientific support could be found for raising the level to 1/4-inch. Since explosion hazards would be increased by raising the level, and since the 1/8-inch level was found to be economically feasible, OSHA decided to stay with the 1/8-inch level over that of 1/4-inch. In addition, it is not clear that significant cost savings would result since the distribution of dust levels in the industry is bimodal--either very low or very high.

Replacing the 1/8-inch action level with an ambient air standard appeared insufficient to control explosion hazards and additionally, was opposed by elements of the industry as unworkable. More specifically, an ambient air standard would require air monitoring and recordkeeping, which companies oppose. Furthermore, an ambient air standard would not take into account the dust that settles on walks, floors, sills and ledges and it is this dust which provides the fuel for the more serious and dangerous secondary explosions in grain handling facilities. Finally, initial analysis by the agency's staff reveals that this standard would be more costly than that which OSHA has drafted.

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* Canadian Grain Handling Association, "Fire and Explosion Task Force Report #1" (1979).

A broadly written, "performance" standard--which would not have any numerical value--was also considered by the agency. While this option was industry's clear choice, OSHA rejected a vague standard on the grounds that enforcement difficulties would lead to uneven compliance and the likelihood that some employers would be forced to meet a lower 1/64-inch standard. The difficulty with a broad performance standard has always been demonstrating what constitutes compliance. In this instance, reference would undeniably be made to the 1/64-inch NAS recommendation, if questions arose as to what constituted compliance in an enforcement context. Accordingly, there exists the strong likelihood that some employers would be forced to meet the 1/64-inch standard, if cited for violating a performance based standard. Resort to expert opinion to give meaning to the broad interpretive language of such a standard would lead to use and imposition of the NAS standard on a case-by-case basis, for that report represents the most expert source of authority in the field. The 1/64-inch number, given NAS's reputation for careful research, can hardly be considered "arbitrary".

OMB points to the ADL analysis (tables contained at pp. E-21 and G-3 of Volume II) as proof that dust control is cost-ineffective and therefore should be eliminated entirely. However, these tables are based on a faulty methodology and the estimates are therefore meaningless. Before discussing specific conceptual and technical problems, it should be noted that ADL recognized the basic impossibility of the task (IV-36 - IV-38). To quote:

> "There is a dearth of high-quality, reliable information available on the specific factors that have contributed to the fire and explosion problem in the grain industry. More specifically, several causal factors are readily apparent to the industry and its observers but the relative importance of these factors cannot be defined with any great degree of confidence... The situation is such that many people have hesitated to define the relative importance of potential causal factors quantitatively. Even where some data have been available, questions have been raised as to their validity. For example, in introducing data compiled on 250 explosion incidents, the USDA has stated: 'When attempting to identify the source of ignition and the location of the initial explosion, past investigations have generally met with little success, and supposition in many cases, has had to replace fact.'
>
> Notwithstanding the above, the cost/benefit analysis that is the focus of the current study required a quantitative assessment of causal factors and their expected benefit. Consequently, estimates of the relative importance of various causal factors is of necessity based on data with far less than ideal qualities."

Despite the vast uncertainty surrounding the causal determinants of explosions in general and ignition explosion-related hazards in particular, OMB asserts that a simple ignition control standard will achieve essentially the same reductions in risk as a more comprehensive standard that also addresses dust levels in the workplace. If ignition hazards can be eliminated, in the theory no explosion can occur even if dust levels are high because both fuel and ignition sources are necessary ingredients. While this line of reasoning has considerable heuristic appeal, the approach is highly unrealistic for exactly the reasons ADL outlined; namely, that most of the ignition sources are unknown or at least highly uncertain. This point is well-demonstrated by the fact that the USDA data* cannot identify the probable source of ignitions for 103 out of 250 explosions in their sample. For an ignition source standard to have any credibility, OMB must assume that this nearly 50 percent of the explosions for which the ignition sources were unknown have the same distribution as the known sources (following the ADL analysis). However, this is an extremely strong assumption that tends to systematically inflate the risk reduction estimates for controlling ignition sources because the greater likelihood is that most of these unknown cases are largely unaffected by OSHA regulation. Using 250 explosions rather than the 147 known explosions as the denominator for establishing the percentages of past explosions caused by each ignition source would substantially lower the estimates of risk reduction (42 percent versus 70.5 percent). The OSHA approach is designed to balance the control of well-known ignition sources with lower dust levels, in recognition of the fact that most explosions would not occur in the face of low dust levels even where the standard does not cover a particular ignition hazard.

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* Prevention of Dust Explosions in Grain Elevators--An Achievable Goal, Office of the Special Coordinator for Grain Elevator Safety and Security, U.S. Department of Agriculture (January 1980).

The futility of any exercise that tries to quantify the benefits attached to the control of various causal sources is further exacerbated by the basic complementarity that exists between fuel (dust accumulation) and ignition sources in setting off explosions and fires. This interrelationship often makes it difficult, if not impossible, to isolate the effects of controlling just one of them and consequently in assigning benefits to individual standard provisions. This inseparability is illustrated by a common situation where explosions occur--a primary explosion sets off multiple secondary explosions. The primary explosion could be caused by any ignition source, e.g., hot bearings or welding operations, but the second explosions are always caused by suspended dust particles or dust which accumulates on surface areas in the facilities. Similarly, fires which are caused by identifiable ignition sources spread much more quickly and cause greater damage, if heavy amounts of dust are present to act as fuel. On the other hand, low dust levels would not provide adequate fuel for an ignition even where spark prevention actions fail. It is obvious that the probability of an accident and its severity are a joint function of both ignition sources and dust accumulations.

ADL's analysis ignores this interdependency. Instead, all accident costs and consequent regulatory benefits accrue to control of a particular ignition source, irrespective of the dust levels in a workplace. The ADL methodology measures risk reductions as a simple product of the percentage distribution of ignition sources (see discussion above) and a National Academy of Services efficiency rating assigned to the control of various causal factors (NAS data). The benefits of regulation then are equivalent to the total value of property and lives lost associated with the risk reduction even if a particular ignition source was identified as initiating multiple explosions which resulted in massive property damage and loss of life. As a final step, the estimated benefits were allocated in some fashion among the various standard provisions.

This approach has serious limitations of both a conceptual and technical nature. Collectively, these limitations result in a systematic downward bias of the dust control benefit estimates and, conversely, an upward bias to the benefit estimates related to other ignition sources. Among the key problems are:

First, USDA data* on causal factors deal exclusively with the role of ignition sources in determining 250 explosions between 1958-1978. The data base does not allow for gauging the primary cause of an accident or at least the relative contribution of dust on events which are initially caused by other sources. All of the accident costs are assigned to the ignition source. This overlooks the fact that in many cases most of the harm is done by the secondary explosions set off because of dust accumulations. Similarly, dust levels contribute to the severity of grain elevator fires. By attributing the entire value of the averted event to controlling the ignition source, the benefits of controlling this source were overstated; the converse holds for dust control benefits.

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* *Ibid*, pp. 17-19

Second, the USDA report contains only a distribution of explosion events by ignition source, not a distribution of deaths and injuries. ADL apportioned fatalities to ignition sources according to their contribution to events with no attempt to adjust for the relative severity of the events. Yet, differences in dust levels and probable locations would greatly affect this allocation. For instance, explosions due to sparks near bucket elevator legs where dust accumulates in the legs increases the likelihood of secondary explosions with heavy loss of life and property damage.

Third, the ADL methodology automatically impacts a downward bias to the benefit estimates by treating dust control as a "residual". If all events attributable to dust levels had been considered first, most of the benefits would go to dust controls, as low dust levels could eliminate up to 96 percent of explosions (ADL study, IV-64). ADL seemed to recognize this limitation of incremental analysis. "Previous subsections of this chapter have estimated the percentage reduction in the frequency of fires and explosions by virtue of the control or elimination of various key ignition sources. Consequently, the removal or control of fuel sources overlaps with these measures and only incrementally improves the benefits to be realized with respect to prevention of primary explosions."

Finally, each NAS recommendation for controlling a particular causal factor deals with general measures that yield a particular effectiveness rating. Yet, the incremental benefits attributed to specific ignition sources and provisions often rely on dust control provisions. For example, hot bearings can be made less hazardous through automatic hot bearing alarm systems or dust control. In fact, one can not determine how the ADL study magically moved from reductions in risk by type of hazard to reductions in risk by standard provision. Individual standard provisions--like dust control, training and preventive maintenance programs--are necessary ingredients in controlling both ignition and dust sources.

OSHA recognized these problems in its Regulatory Impact Analysis. Its risk assessment (Chapter V) acknowledges the "overlapping" nature of risk reduction benefits which result from several of the standard's provisions. As a result, the benefits assessment (Chapter VI) does not attempt to allocate regulatory benefits to individual provisions, for this would have been inappropriate. Rather, it assesses the standard as a whole when conducting a cost-benefit test.

It should be emphasized that OSHA does not consider 1/8-inch to be a "safe level" of dust accumulation. It is well recognized that dust accumulations in these quantities provide more than enough fuel to contribute to a dust explosion. Instead, the 1/8-inch level is an "action level," i.e., a predetermined level of dust accumulation at which corrective action must be initiated. Moreover, the proposal's measurement requirement is not unusual, as demonstrated by the widespread reliance on this approach in various industry recommendations. It can be easily measured through use of a ruler and estimates of square footage based on "rules of thumb." OSHA will accept any reasonable measurement technique--the intent here is to get employers to be aware of the problem and to take appropriate action not to have engineering school precision. Effective and consistent measurement techniques can be disseminated through adminstrative controls and training programs sponsored by employers, OSHA and trade associations.

3. Burdens on Small Business

Based on the analysis in the ADL report, in particular Table G-1 in Volume II, OMB has identified a number of potentially adverse impacts of the proposed regulation on small business. However, a careful review of the methodology and assumptions contained in the ADL report indicate that they overestimated the compliance costs and financial impacts on the country elevator and small feed mill facilities.

OSHA has identified the following six areas in which more realistic assumptions would result in better estimates of the actual impact of the proposed standard on small business. Substituting in these more correct assumptions should lower the costs by up to 30 percent. These assumptions are:

(1) The trend in the construction of new country elevator facilities is toward the use of outdoor legs. An estimated 15 percent of all country elevators currently are outside facilities. This structure significantly reduces the cost of housekeeping requirements, since no dust can accumulate in a contained area. The ADL report does not account for the significantly lower dust control costs applicable to these facilities.

(2) The number of country elevators and small feed mills which currently meet some or all of the requirements for emergency action plans and training have not been taken into account in the ADL study. Therefore, the percentage of these facilities that will be affected by the proposed standard under these two provisions may be overestimated by as much as 5 to 10 percent.

(3) The methodology used to assign costs to each category of facilities may overstate the costs which can be directly associated with the standard. Specifically, many facilities which are owned by larger operations (between 30-40 percent of the country elevators) currently conduct housekeeping operations for purposes of safety and efficiency, and to obtain reduced insurance premiums. While few, if any, facilities conduct housekeeping operations frequently enough to satisfy the proposed 1/8-inch action level standard, the cost of current operations should not be included in the estimated cost of the proposed standard.

(4) Dust control costs associated with cleaning the loading area have been overstated in the ADL report. Estimates of the time required for dust removal during each shift should be sufficient to include housekeeping of the loading area.

(5) The ADL report overestimates the number of facilities that will be affected by requirements for development of emergency plans and purchase of tags for tagout procedures. In many cases, these items are provided at no cost by insurance companies to promote safe operations and to reduce loss claims. Taking this into consideration will reduce the actual costs of the regulation associated with emergency action plans and tagout procedures.

(6) The cost of compliance with the dust control provisions may be overstated for feed mills. These facilities are involved in a production process which produces inherently less dust as a result of lower volume usage and different handling operations. As a result, small feed mills may incur lower costs for dust control than country elevators.

In addition to the cost overstatement, the analysis of impacts on small entities based on the relationship of costs of compliance to profits in grain elevators is misleading and inappropriate. The vast majority of country elevators (about 95 percent) are not independently owned; rather, they belong to cooperatives or captive firms. Many of the cooperatives are not "for profit" organizations; instead, they distribute patronage refunds to their members. These refunds constitute a line item on the balance sheet which is not captured by the Dun & Bradstreet data on which the analysis is based. The profit of the country elevator, therefore, is not an appropriate measure of its economic viability.

Grain elevators owned by larger firms are not independent economic entities. In many cases a single elevator is not a cost center and the pricing mechanism established with the parent company is for purposes of transfer and accounting practices alone. Profit as reported by Dun & Bradstreet data is a misleading indicator of the economic impact for captive grain elevators.

These conceptual problems can not be handled with the Dun & Bradstreet financial data. The ADL analysis is based on this data source which contains numerous limitations that confine its applicability. These limitations are:

- Based on a very small non-representative sample of facilities with high reporting bias.
- No ability to determine owner's compensation or patronage refunds.
- Representative balance sheets used in this analysis are determined by averages with no ability to distinquish among ownership categories.

- The data cannot identify the ownership arrangement of the elevators and their finanical status.

Taking into account both the overestimated costs and the irrelevance of a profit analysis for grain elevators, it is fair to say that OSHA's regulatory flexibility analysis conclusion of a limited impact on small business is accurate.

4. Coverage of Other Industry Segments

Information obtained by OSHA indicates that the hazards associated with other segments of the grain handling industry, such as mills, may present similar risks as those associated with grain elevators. For instance, the NAS Report, Prevention of Grain Elevator and Mill Explosions (p. 123) states: "Mills of any type (feed, flour, soy, rice, etc.) are subject to the same dust explosion hazards as grain elevators since their input is grain and, before processing, it is handled in the same manner as in elevators... Mills, however, are subject to additional dust explosion hazards because of the actual processing of the grain."

Moreover, the available statistics concerning explosions at grain handling facilities strongly support the finding of the NAS Report. The ADL study reported that from 1958 to 1978 there were approximately twice as many recorded explosions in grain elevators than in feed mills (IV-19). However, the study pointed out elsewhere that there were nearly three times as many grain elevators as feed mills (Table IV-13 at IV-23), thereby maintaining the incidence of explosions per facility roughly the same between grain elevators and feed mills--1.46 per 1,000 grain elevators compared to 1.15 per 1,000 feed mills.

Furthermore, the U.S. Department of Agriculture rated hammer mills, roller mills, and other grinding equipment in feed mills as the second most probable location of explosions in grain handling facilities*.

For these reasons, OSHA firmly believes that there is sufficient evidence to justify the inclusion of mills under the proposed rule. Even with the information obtained to-date, however, OSHA believes that the inclusion of those segments of the grain handling industry in the scope of the standard to be an issue requiring additional data and discussion. Accordingly, the proposal (p. 19) requests additional information and data concerning the appropriateness of the scope of the proposed standard. The record developed as a result of the proposal will provide the evidence needed to ultimately determine whether mills should properly be included or excluded from the standard under the Supreme Court's "significant risk" test.

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* Ibid., p. 17.

5. Other Provisions

OSHA believes that the other provisions of concern to OMB are necessary to protect workers and will have only a minimal impact on small business. To this end, the proposal contains "grandfather clauses" as well as a delayed effective date for many of the provisions. Most importantly, the extra three-year extension to comply with dust control provisions alone saves small firms 43 percent in annualized costs and, as noted, we believe that the current cost estimates are too high. Indeed, we have already modified many of the same provisions targeted by OMB as imposing excessive costs on small operations with an eye towards lowering small firm impacts. At the same time, OSHA must assure that the control strategies put in place provide effective protection to workers in small firms. A brief discussion of the underlying rationale for each specific provision questioned by OMB follows:

In order to set up an effective preventive maintenance program, inspection doors are needed to inspect the pulley, lagging, and belt in the elevator head and booth sections. The cost-effectiveness of inspection doors is supported by the fact that this step has already been taken by the overwhelming majority of elevator operators. Only one percent of the grain handling facilities would have to take additional steps to comply with this provision (ADL Report at VII 1,2).

Similarly, the need for access to the interior of the bucket elevator leg is crucial, for both the U.S. Department of Agriculture and the National Academy of Sciences found this area to be the most dangerous location with respect to initial dust explosions (ADL Report at IV-10, NAS Report at p. 19).

The proposed provision concerning two means of escape is not as stringent as existing provisions. Currently, grain handling facilities must comply with 29 CFR Part 1910, Subpart E, with respect to means of egress. Additionally, fire-resistance rated enclosures are required for stairways used as exits. Most existing grain handling facilities have at least two means of escape, but these means of escape do not technically meet the current Subpart E requirements for means of egress. Earlier drafts of the proposed rule contained requirements much stronger than those in the present draft, but met with heavy industry opposition. Accordingly, the Agency rewrote this provision to provide some measure of protection and safety regarding means of escape, while at the same time only requiring industry to make limited, if any, adjustments to existing facilities. OSHA is simply proposing that at least two means of escape be provided from certain areas of the facility, and that the escape routes be separated from each other to the extent feasible. As proof, ADL projects that all grain handling facilities already meet this basic safety requirement (VII-29).

Grain driers have been the source of numerous fires in grain handling facilities. OSHA considers the two provisions that automatically eliminate the fuel sources should a problem occur in the drier (i.e., shutdown of the fuel source and shutdown of grain going into the drier) as minimum precautions in reducing the number of fires in driers. Additionally, the provisions concerning driers installed after the standard's effective date are for the purpose of isolating the drier from the facility. This may be acomplished either by installing driers outside the facility (National Grain and Feed Association, A Practical Guide for Elevator Design, p. 338); or, if not outside, by providing alternative means that will protect employees from the hazard of grain driers.

Entry of foreign objects into the bucket elevator, hammer mills, grinders and pulverizers can create a sparking hazard or the "damage they cause may lead to an explosion through friction heating or spark generation by the damaged hammers or buckets" (National Academy of Sciences, Prevention of Grain Elevator and Mill Explosions, p. 50). OSHA believes, therefore, that some protection must be afforded to this equipment, in the form of grates and/or magnets, to lessen the potential occurence of such problems.

To facilitate small business compliance, OSHA has provided employers with the choice between magnets or grates. Further, if a facility has a magnet placed at the receiving pit, no screen is necessary at the hammer mill, grinder or pulverizer.

Lastly, OSHA believes that the provisions concerning bin entry are necessary due to the large number of employee deaths and injuries occurring as a result of such entries. These provisions are well-supported by comments received from industry during the review of a previous draft proposal.

6. Providing Exemptions

The proposal contains performance-oriented provisions for the very purpose of encouraging effective alternatives and for recognizing new technology. For example, the housekeeping provision simply states that the "employer shall develop and implement a housekeeping program consisting of dust control and removal method or combination of methods which will minimize fugitive grain dust accumulations inside grain handling facilities on ledges, floors, equipment, and other exposed surfaces." There is no specification of how to accomplish this housekeeping. Rather, the nonmandatory appendix (pp. 97-104) provides guidance on the use of various alternatives and new technology to comply with the housekeeping program provisions.

More specifically, the use of edible oil to minimize dust is discussed on p. 104 of the proposal. The appendix does not discourage this new technology. To the contrary, it simply notes that the current state-of-the-art method is somewhat limited in scope and effectiveness. For instance, repeated handling of the grain may necessitate additional oil treatment to continue retarding the liberation of grain dust. In addition, operators of grain handling facilities should be aware that the Food and Drug Administration must approve the specific oil treatment used on products for feed or food, which may limit the degree of technological innovation available to an operator.

In sum, by allowing maximum flexibility in the means to accomplish housekeeping, OSHA does not believe that "specific exemptions" are necessary in order to provide credit for various technologies.

7. Need For Regulation

The evidence overwhelmingly supports the existence of a significant risk of harm to employees in grain handling facilities. USDA data shows that there have been at least 375 explosions in grain elevators and feedmills during the period 1958-1982. These explosions are responsible for 201 deaths and 769 injuries. Moreover, the accident trend is upward. For the period 1958-1975, there were 10.8 explosions per year resulting in an average of 3.9 deaths and

21.8 injuries. By contrast, the 1976-1982 period witnessed 25.7 explosions per year resulting in an average 18.7 deaths and 53.9 injuries (ADL study, IV-7).

OMB disputes this trend contending that two successive years of catastrophic explosions (1976-1977) should be excluded. Interestingly, OMB's own trend analysis purporting to show an 80 percent drop in fatalities since 1977 includes those years (they compare the 1958-1977 period with the 1978-1982 period).

OSHA believes that these years should properly be included as part of any regulatory decison designed to lower the incidence of explosions and loss of life and limb. Averaging in both high and low accident years over time will tend to smooth out these events. Moreover, these years are not unique aberrations never to be repeated again as witnessed by the recent grain agreement with the Soviet Union. Similarly, the recent grain embargo probably had an opposite effect on accidents--reducing them below what they would have been otherwise. These cicumstances are simply a reflection of the fact that accidents are a function of the amount of grain being handled by the industry and employment levels (i.e., business cycle effects). It is also interesting to note that the two years where explosions resulted in a large number of death and injuries, the number of explosions was not inordinately high.

Moreover, even excluding the heavy disaster years (1976-1977) the accident trend points upward. The number of explosions increased from 10.83 per year over the 1958-1975 period to 25.4 per year between 1978-1982. The average number of deaths and injuries rose from 3.9 and 21.8, respectively, over the 1958-1975 period up to 8.6 and 41.6 for the 1978-1982 period.

Regression analysis also supports an increasing accident trend in the grain handling industry. We regressed the number of explosions, deaths, and injuries per 10,000 employees on time and a dummy variable for the two years of high disaster incidence (1976 and 1977). A positive and significant coefficient for the time variable would confirm our view of the increasing hazardousness of the industry. The table below shows the regression results:

(1)	Explosions Per 10,000 Employees	=	1.27* +	0.70* time +	1.06 dummy (76/77)	
			(.36)	(.36)	(.65)	R^2=.34
(2)	Deaths Per 10,000 Employees	=	0.27 +	0.07* time +	5.02* dummy (76/77)	
			(.45)	(.03)	(.81)	R^2=.68
(3)	Injuries Per 10,000 Employees	=	3.03 +	0.70* time +	7.39* dummy (76/77)	
			(.83)	(.34)	(1.48)	R^2=.58

Note: The * indicates significance at 90% confidence interval and greater. The ( ) are standard errors of the coefficients. Data Source: RIA, Table V-2.

The statistical results support our position of an increased frequency of explosions, deaths, and injuries and the consequent need for regulation. There exists a positive time trend in grain elevator and mill injuries, even when controlling for the 1976 and 1977 experience as one of extraordinary injury frequency. This increased frequency has occurred in spite of hazard alerts and some evidence of the adoption of safer practices. Where grain handling facilities have adopted safer practices, OSHA believes that the proposed standard's use of performance requirements (which allow for greater compliance flexibility) will benefit those with safer practices.

Senator LEVIN. God forbid that we know who is making these decisions!

It is a fundamental issue in a democracy, to know who it is that is making decisions which affect our lives, and here we don't know. OMB goes through the process: "Oh, it is the agency that is doing all of this," trying to avoid any record of their input into this process. That is what this legislation which we have introduced would stop.

We have gotten it passed in the Senate a couple of times, but it hasn't been passed in the House. The Justice Department has ruled that there should be much more in the rulemaking file than the OMB has put in. In fact, we can't find those rulemaking files at OMB at all. I will get into that with Jim Miller when he comes.

We don't know who is making the decisions. Right or wrong, we can argue whether or not there ought to be one-eighth of an inch dust standard, one-sixty-fourth of an inch dust standard, whether or not we ought to sweep once a shift, or twice a shift, what equipment you can have. You can argue that substantively and make a decision. I want the decisionmaker held accountable for that decision, and that is what we don't have right now in this country because of this process. That is the fundamental issue.

It is obviously important what the substance of the dust standard is, too, obviously, it is critical. It is a life and death decision, as we know, and we don't even know who is making it at the moment.

Senator DURENBERGER. Carl, would you be prepared to yield for a few minutes to Al?

Senator LEVIN. Sure.

Senator DURENBERGER. We are going to have to decide that we are going to take 5 minutes, and go, around a couple of times if you have more questions.

Senator LEVIN. I will be happy to do that.

Senator GORE. Thank you, Mr. Chairman.

I congratulate you and Senator Levin on calling these hearings. I strongly support the legislation which you have introduced. I have been active in exploring this particular issue myself as a Member of the House of Representatives on Congressman Dingell's Oversight and Investigation Subcommittee. I spent a great deal of time on this issue, indeed, before Congressman Dingell chaired that particular subcommittee. I have felt since the inception of Exective Order 12291 that it was simply unconstitutional and that it was only a matter of time before that conclusion was reached in the courts.

I have a particular interest in the grain dust standard because of what happened in Knoxville, TN. On September 19, 1984, as has already been mentioned in this hearing and as was graphically illustrated by the film that was shown, three major explosions ripped through the ConAgra Corp.'s feed grain facility in Knoxville, starting a fire storm that swept through the facility, leaving three people dead, and 45 jobs, and a $3.5-million facility destroyed. It was in every sense a disaster.

As these witnesses pointed out, it is only one of the many disasters that have taken place across the country that could have been prevented by a grain dust standard.

Ms. Berkowitz, am I correct in interpreting your testimony as containing the clear statement that if the original grain dust standard recommended by OSHA had been allowed to go into effect, this explosion in Knoxville could well have been avoided?

Ms. BERKOWITZ. Yes. The finding of OSHA was that the reason for the explosion was that grain dust was allowed to accumulate in the basement and workfloor areas of the elevator in amounts sufficient to support an explosion such as the one that occurred. The whole point of the OSHA standard was to prevent those kinds of dangerous accumulations.

Senator GORE. So, these three deaths in Knoxville were unnecessary. They didn't have to occur. One of the reasons they occurred is that the safeguards recommended by scientists and by the agency responsible for preventing such deaths were obstructed by bureaucrats in the Office of Management and Budget who know absolutely nothing about the science involved, or the safety standards that were under debate. Is that correct?

Ms. BERKOWITZ. That is true. There were no science or explosion experts at OMB.

Senator GORE. In this instance there is no question of risk assessment involved. It is not like a debate over whether or not some substance is going to produce cancer in one out of 100,000 or two out of 100 million. We know what the risk is. It has been demonstrated in explosion after explosion. Nor is it a question of what is necessary to diminish that risk and to prevent the hazard. We know how to do that. The National Academy of Sciences has studied it. OSHA has studied it. It has gone through a lengthy process of review, and we know exactly how to prevent these tragedies.

What has happened is that this procedure established in the beginning of 1981 has given some business interests who don't want regulation of this kind the ability to hot-wire the regulatory process.

Under the Constitution, power can be exercised by the executive branch in two ways: It can be exercised pursuant to the inherent powers of the Presidency and those powers enumerated in article II; but more frequently, power exercised by the executive branch is exercised pursuant to a delegation of power coming from the Constitution in article I to the Congress, and then to the Presidency.

The authority to establish safeguards in grain elevators was delegated to the executive branch by the Congress. As with a great deal of regulatory authority, it was accomplished by a congressional insistence that certain procedural safeguards be followed in the exercise of that power.

Senator DURENBERGER. Al, would you yield for just a second?

Senator GORE. Yes.

Senator DURENBERGER. Are you leading up to a question? I am just trying to figure out whether we can finish here by noon. I don't want to eliminate any debate because we haven't undertaken that at all.

Senator GORE. Yes, I was leading up to a question, but I will be glad to stop, if you want. I listened to some 15 minutes of questions from the chairman, and 10 from my colleague.

Senator DURENBERGER. No, it was just a question on my part as to whether you were making an opening statement, or if you are leading up to a question. You can do either.

Senator GORE. Thank you, I appreciate that.

I was asking a question that was beginning to resemble an opening statement. I thought about rehabilitating it with a question tagged onto the end of the statement. The chairman may be familiar with that technique.

The point I was trying to make is central to an understanding of what has been going on here. We delegated this power to the executive branch, and we insisted that certain procedural safeguards be followed in order to prevent the abuse of the power that we delegated. The safeguards included insistence that there be a record kept of what influences were brought to bear on the decisionmaking process, safeguards to ensure that there was not a disproportionate ability of one party to an argument to determine the outcome.

The procedure that OMB has established completely subverts those procedural safeguards. As I said before, it allows a hot-wiring of the process, and that is exactly what happens.

As my colleague, the Senator from Michigan, has pointed out, contacts were made in secret.

Do you agree with my own conclusion that this is an extra-constitutional exercise?

Ms. BERKOWITZ. I sure do.

Senator GORE. You agree with my statement, then?

Ms. BERKOWITZ. Yes.

[Prepared statements of Ms. Berkowitz and Mr. Jackson follow:]

TESTIMONY OF DEBORAH BERKOWITZ
DIRECTOR, SAFETY AND HEALTH
FOOD AND ALLIED SERVICE TRADES DEPARTMENT, AFL-CIO
Before
THE SENATE INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE

January 28, 1986

Mr. Chairman and distinguished members of the subcommittee, thank you for the opportunity to appear here today to discuss our concerns over the Office of Management and Budgets' role in the rulemaking process. I am the Director of Safety and Health for the Food and Allied Service Trades Department, AFL-CIO -- an organization comprised of 15 unions representing over 40,000 workers in the grain elevator and processing trades.

In our view, what is at stake here today is whether the legislative mandate given to the Occupational Safety and Health Administration by Congress is still in effect. For the story of OMB's involvement in OSHA's grain elevator and mill safety rule, raises serious questions about OSHA's ability to carry out its mandate to protect the lives and health of working people. These past five years are witness to your concern, Mr. Chairman, raised in your opening statement that regulatory review has turned into regulatory neglect. In this case, the neglect has left hundreds dead and injured, thousands temporarily or permanently out of work, and devastated the economic base of many communities.

Grain dust, a by-product of processing corn, wheat, and other grains, is explosive. It is nine times as explosive as coal dust -- pound for pound it's more explosive than TNT. In the last ten years, grain dust explosions have ripped through 212 elevators and mills, leaving 144 dead and 461 injured. In the last 3 months alone, there have been 12 explosions, killing 5 and critically injuring 12. These explosions can be prevented by controlling both the grain dust and the ignition sources that light these devastating fire balls.

However, in 1978, the U.S. Department of Agriculture released a report on preventing grain dust explosions stating that the United States "has possessed the necessary knowledge and many of the prevention techniques to prevent grain dust explosions for at least 60 years.... but they have not been adequately implemented."

Yet in late 1980, David Stockman, the soon to be director of OMB, wrote in the Washington Post in the Stockman Manifesto, that regulations to control grain dust, regulations that would require the implementation of preventive measures, were on his priority list for being blocked. This manifesto single handedly derailed OSHA's effort to control grain dust explosions (an effort begun in 1978) for two years. In fact, for a time, OSHA went so far as to remove grain elevators from their high hazard list -- as though to say out of sight -- out of mind. In that two year period grain dust explosions ripped through 36 more facilities, leaving 24 dead and 114 seriously injured.

Then, in 1982, the National Academy of Sciences released a report on grain elevator explosions. In testimony, in 1982, before a House subcommittee, the head of the panel that wrote the NAS report stated that "80% of elevators in the U.S. were currently at risk of a disastrous secondary grain dust explosion" -- because the safe practices needed to prevent them were "just not there."

OSHA resumed its grain dust regulatory activity right after the NAS report was published. Then, in early 1983, OSHA sent a draft grain handling safety proposal to OMB for review -- a proposal on which OSHA spent ten months actively soliciting comments from all affected parties. OMB extended its 60 day review period of this standard to 8 months -- finally forcing OSHA to significantly alter this proposal in order to get it published.

The extended OMB review resulted from a series of private meetings between OMB and certain parties interested in maintaining the status quo. These meetings took place after OSHA had already obtained the views of these parties on the proposal with an opportunity for rebuttal. These were private meetings and they were called for by OMB.

The head of ther review team at OMB, for this standard, was the economist John F. Morrall, who has stated publicly that OSHA should not be in the business of setting safety regulations. The fact that both he, and the OMB itself share the philosophy that OSHA has not been effective, raised serious questions about the objectivity of this review. In addition, given Mr. Stockman's earlier announced plan to block such a regulation -- even before it was conceived -- raises doubts about whether the outcome of OMB's review had been predetermined.

At the insistence of OMB, the OMB review of the grain handling safety standard was conducted in a secretive fashion. OMB insisted that a bare minimum of documents be exchanged between it and OSHA and that no notes be kept of meetings. At various stages OMB officials would telephone their positions on the proposal to OSHA. Notes of these conversations were then shown to select OSHA officials for analysis. The resulting OSHA staff written response -- or actually OSHA's rebuttal of OMB's comments -- was then presented to the Department of Labor deputy solicitor Francis Lilly. In one instance, rather than present a 27 page written rebuttal from OSHA to OMB, Mr. Lilly orally transmitted the information to OMB at OMB's insistence.

Though OMB had no safety engineers, health professionals or occupational health specialists working on this review, they succeeded in getting OSHA to significantly alter the proposal on how best to prevent dust explosions.

Why did OMB want OSHA to change this proposal? Because, according to OMB, OSHA placed too much emphasis on dust control! Though the National Academy of Sciences and the USDA both saw this as the key to preventing explosions, the economists at OMB obviously thought otherwise. OMB also told OSHA that they had underestimated the effectiveness of private incentives to regulate the marketplace -- and the standard was not necessary. These private incentives included higher wages commanded by workers in this high risk industry. Well, not only are the wages in most of this industry low, but most workers do not know this is a high risk industry. OMB also told OSHA to leave out all the smaller facilities because the risks were less -- though recent figures show that over 50 percent of explosions are in smaller facilities. In fact, the most recent explosions, on November 2nd, in Marion, South Dakota that killed 3 and now threatens to cripple the area's economy, was such an elevator.

OMB's role in this rulemaking did not end with a changed proposal. The staff at OSHA is so terrified of an OMB rejection of their final standard, that they have tailored it to make sure it will be accepted. **I have seen a draft of the final standard,** and it offers no hope, comfort, or consolation, much less protection, to the thousands of grain elevator and mill workers who put their lives on the line every day. **Instead, it will have exempted, of the total 11,200 elevators in the United States, 10,415 from dust control provisions.** This is rule by exemption. This way the rule will pass OMB, it will give the appearance that OSHA is carrying out its mandate -- it just won't cover anybody or protect anybody.

There is a high cost in letting OMB be the final and only word in the rulemaking process. Mr. Jackson will discuss with you what these costs are and what it means -- to both families and communities.

TESTIMONY OF LARRY JACKSON

SECRETARY-TREASURER, AMERICAN FEDERATION OF GRAIN MILLERS

Before

THE SENATE INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE

January 28, 1986

I am Larry Jackson, Secretary-Treasurer of the American Federation of Grain Millers, a union representing over 25,000 workers in the grain storage and processing trades. I am always amazed at the ease with which our so called economic watchdogs conjure up their economic voodoo reasons to strip away the legislatively guaranteed rights of working people to a safe and healthful workplace. And I am equally amazed how these prophets of efficiency rarely consider that by refusing to protect working people they are calously condoning, and may even be responsible for, weakening the economic viability -- if not destroying the economic base -- of small towns dependent on a safe and healthy industry.

This is exactly what happened a little over two months ago in the small farming town of Marion South Dakota. A devastating grain dust explosion ripped through the Marion Farmer's Co-op elevator, leaving three dead, four seriously injured and the economic base of this small community in ruins. The explosion occured during the corn harvest -- when the need for the elevator was at its peak.

In my own home state of Minnesota, where the grain industry is the underlying basis for many small farm towns and a key industry in our big cities, we have seen our share of devastation. Since 1980, the year the Office of Management and Budget first gave the thumbs down signal to OSHA on the prospect of a safety standard designed to prevent these tragic explosions, grain dust explosions have ripped through 12 facilities in Minnesota, leaving seven dead and thirty-seven seriously injured.

Contrary to the assertion by the OMB that these explosions are primarily limited to the few large export elevators in the U.S., the bulk of these explosions in my state were in small feed mills and elevators -- in the small, farming towns of Darwin, Comstock, Hendricks and Lake Lillian.

But it's not only the small towns that can be hurt. Last year in the city of Knoxville Tennessee a small elevator and feed mill complex was destroyed by a devastating grain dust explosion that left three dead and eleven injured. It threw over 20 people out of work -- for the mill was never reopened. To OMB these are just numbers, but in reality these were widows, orphans and over 23 families left without a livelihood. That's what I see and I must deal with when an elevator explodes -- while OMB merely counts its sterile numbers and weaves its intricate theories. The most tragic aspect of this explosion is that during OSHA's investigation into the cause -- a high level of grain dust was found to be the culprit. Had the standard OSHA wanted to promulgate been in place, Mr. Chairman, a standard that would have mandated that grain dust levels be controlled, this tragedy may have been prevented.

In my experience, the arguments OMB has put forward to block an effective grain dust standard from being implemented bears little resemblance to the reality facing this nation's 200,000 grain elevator and mill workers. OMB states that grain elevator workers can command higher wages because they work in high risk workplaces. Supposedly this then gives elevator owners enormous incentives to clean up their elevators and make them safer -- or else they may have to pay even higher wages. Therefore, an OSHA standard is unnecessary. Even more, in figuring out the costs and benefits of any grain safety standard, OMB theorists posture that grain workers value their lives less because they work in a dangerous industry. Therefore, their lives are worth less. Now, this may sound good over coffee in the New Executive Office Building, but it won't play in the real world.

First, as you know, elevators operate seasonally. A small country elevator for example may only operate for two months out of the year, while a large grain elevator may slow down significantly for two months a year. You don't go to work in the grain elevator or milling industry if you want to own a yacht. Not only is the work often less than a years worth, but the wages are not high!

Second, if you live in a small farm town -- or even a milling city, you often don't have a choice about where to work. What's your choice in a small town -- to work in a non-existent auto plant? It's not that workers value their lives less, it's that there is often no choice. And more importantly, most workers do not know that grain dust is explosive. They don't know it's a high risk industry. These explosions are not publicized very well. How many people here knew that there were 23 grain dust explosions in 1985 and 2 just this year.

And further, among workers that have heard of the potential for danger, they just don't think it will happen to them. I know -- I used to work in this industry. And I still hear from workers the refrain -- oh it won't happen to us.

In my view, there can be no debate regarding the pain and misery that results from the searing of human flesh and the enormous emotional and physical consequences which result from such injuries. We cannot sit idly by and watch the sterile debate conducted by OMB result in further death and destruction. If the small town of Marion South Dakota would have known that to spend $1,500 -- or even $10,000 over a few years would have saved their elevator and their harvest -- would they have spent it? Why are the economists at OMB making this decision -- and opting for devastation rather than safety? Why have they been allowed to take over the role that Congress assigned to OSHA? The consequences of letting OMB's review be the final and only word, can only spell disaster for this nation's grain workers.

Mr. Chairman, and distinguished members of this subcommittee, I thank you.

Senator **Gore**. Let me ask, Mr. Chairman, if I may include articles in the record detailing the explosions, and the aftermath of the explosions at the Con-Agra facility in Knoxville.

Senator **Durenberger**. Certainly, without objection, they will be made part of the record.[1]

Senator **Gore**. I will withhold further questions.

Senator **Durenberger**. Carl, do you have further questions?

Senator **Levin**. Not of these witnesses, but we do owe them a debt of gratitude.

Senator **Durenberger**. I thank you both. Staff has prepared some detailed questions, some of which they may have gone over with you in advance, that we will submit for your elaboration and their inclusion in the record. My colleagues here, and perhaps other members of the committee also might have questions to ask also to complete this record. We are anxious to have it complete because, as we have indicated, we have put in this legislation again to make sure that we do something about that this year. This record is designed to support that particular effort.

I thank you on behalf of the committee. I thank you for your cooperation with the staff in preparing for the hearing, and for presenting testimony on behalf of all the people out there who could appear in next year's film, or this year's film. I thank you for your efforts over the years, both as members of the union and as representatives on its behalf.

Why don't I yield to my colleague from Michigan for his opening statement.

OPENING STATEMENT OF SENATOR LEVIN

Senator **Levin**. I had hoped that Mr. Miller would be here, but I think, for the benefit of saving time, I will be happy to do this, Mr. Chairman, particularly since I am not a member of the subcommittee. I appreciate your inviting me to participate in these hearings.

Mr. Chairman, for the past 5 years I have been battling with OMB over their failure to adequately disclose to the public their role in reviewing agency rulemakings. And the failure to negotiate an acceptable truce has resulted in not only the lack of adequate regulation the possible consequences of which have been so graphically displayed here this morning, but also the growing distrust of an opposition to OMB and its role in the regulatory process.

I am very pleased that the chairman of this subcommittee has called these hearings and has cosponsored the bill I introduced yesterday entitled the Rulemaking Information Act of 1986. I am also pleased to continue to have as a co-soldier in this battle, Senator Rudman, who cosponsored with me the amendment to S. 1080 requiring disclosure of OMB's involvement which passed the Senate by a vote of 92 to 0 in 1982.

The Rulemaking Information Act of 1986 would: mandate inclusion in an agency's rulemaking file the evidence necessary to determine OMB's involvement and the role of outside parties in shaping that involvement; limit the time for OMB's review of a rule; require a public record of dates rules are submitted to and returned by OMB; require disclosure of an agency's draft and final rulemaking agenda submitted to OMB for review.

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[1] See pp. 425-452.

In addition to my longstanding concern over the lack of public disclosure, is my growing concern for the quality of the review process itself, substantively, and the extent to which OMB is ignoring the advice of its own Justice Department that its role must be only advisory. While claiming it is a consultant, OMB is acting more like a dictator.

Let me point out, here, that I have been a supporter of the concept of Executive oversight. I like the notion of a President who is watching the shop and that as an elected official, he is the person—allegedly acting through OMB—to whom the public can turn both for results and for blame. And it is a legitimate way to avoid unnecessary duplication of and inconsistency in rules. Finally, it protects us from the "tunnel vision" of agency personnel that can come from being identified as the "protector" of any particular interest area. In short, the concept of executive oversight of agency rulemaking, makes good management sense. And over the past 5 years I have stated that position on numerous occasions.

But, the OMB is undermining the genuine support for the concept of Executive oversight—that is an advisory, coordinating role for the President in the rulemaking process—by persons like myself and some of my colleagues, by the high-handed and strong-arm manner in which it is implementing the concept.

It has bullied agencies who have been given the authority to issue regulations. Former Chief of Staff for the Environmental Protection Agency, John Daniel, testified at a House hearing that when EPA did, in fact, go ahead and issue "some regulations over OMB's objections," he got a call "from an OMB official . . . Mr. Jim Tozzi who worked with [the Director of the Office of Information and Regulatory Affairs, OIRA] at OMB at that time . . . . [and who said] words to this effect, that there was a price to pay for doing what we had done, and that we hadn't begun to pay."

So when EPA decided to do what they felt was their statutory obligation in carrying out the law, they got a call from OIRA saying that for ignoring OMB's comments, EPA was going to pay a price that we and the EPA hadn't yet begun to pay that price.

OMB has trashed congressional concerns for public participation and awareness in the rulemaking process.

It has ignored indications from Congress that sunshine is an essential element to the success and legitimacy of OMB review.

I believe it has even ignored the specific requirements of its own order and the recommendation of its own Justice Department and we will be exploring this issue at greater length at this hearing.

And, perhaps, Mr. Chairman, most offensively, OMB has spoken out of two sides of its mouth when it characterizes its role in this process. OMB directors and OIRA directors have all said at one time or another that they support greater disclosure of OMB's involvement in the rulemaking process. We worked out a compromise amendment to S. 1080, the Regulatory Reform Bill in 1982 and the Paperwork Reducation Act Reauthorization in 1984, which OMB finally supported, which included the bulk of the provisions contained in the bill we introduced yesterday. The bills to which these amendments were attached never became law, but the requirements contained in both these pieces of legislation could have been implemented by OMB administratively with little effort, but to date, little has been done but for a token gesture to EPA. While OMB's words favor disclosure, their actions reflect the sentiments of former OIRA employee, Jim Tozzi, referred to earlier, when he cautioned the OIRA staff not to leave fingerprints.

OMB also speaks out of two sides of its mouth when it on the one hand badgers rulemaking agencies into submission, and then turns around in court and pleads innocence for the final outcome, arguing its role—as defined by the limits of the Constitution—is that of an advisor or consultant. It's not dissimilar from the kid who murders his parent and they begs the court for mercy because he is an orphan.

Mr. Chairman, in conclusion, the Justice Department has stated explicitly the context in which OMB's review of rules is permissible under the Constitution, and that is with OMB in an advisory or consultative role. I not only defer in this instance to their legal analysis, but I support the outcome from a public policy perspective. The right of the President through OMB to review rules is and should be limited to the right to state a timely opinion, not to delay rules indefinitely until the agency capitulates or complies. It goes without saying that in the last analysis, the President always retains the right to fire his political appointees. That is the ultimate sanction the President has. But that is far different from OMB's process of delay until capitulation, which is indeed the process we have in place now and which today's testimony is expected to confirm.

Frankly, I am growing weary of fighting to improve the process. I beleive that maybe it would make more sense to simply prohibit OMB's involvement completely until Congress can be shown that OMB can handle such duties in a responsible manner. That would not be my preference. However, I think that we should keep it as an option pending the outcome of this hearing and OMB's actions over the next several months, and the speed with which legislation of the type we introduced yesterday can be enacted into law.

Thank you, Mr. Chairman.

Senator DURENBERGER. Thank you very much.

Albert, do you have an opening statement?

Senator GORE. If it is appropriate to give it now.

Senator DURENBERGER. Yes, go ahead.

OPENING STATEMENT OF SENATOR GORE

Senator GORE. Thank you, Mr. Chairman.

It has been almost 5 years now since this administration initiated a system wherein the Office of Management and Budget assumed enormous control over virtually all activities of the Federal Government. With the issuance of Executive Order 12291, OMB was vested with the authority to review any and all regulations issued by any agency of the Federal Government. With this authority, OMB also assumed all of the necessary power to delay and obstruct any action which did not meet their own standards.

I criticized this system at its inception, and I remain critical of it today. In my opinion, OMB's intervention in rulemaking is based on dubious constitutional grounds and should be stopped.

When it passed the Occupational Safety and Health Act, the Toxic Substances Control Act, the National Environmental Policy Act, and other statutes designed to protect the American public safety and health, the Congress delegated its constitutional authority to certain regulatory agencies. Nowhere in these laws does Congress use the words "Office of Management and Budget," or "Exeuctive Office of the President." OMB has merely usurped this regulatory authority.

Now, if corporations have an objection to a particular regulation, they can express those objections in secret, removed from public view. In case after case, under Executive Order 12291, we have seen how, if a corporation doesn't get what it wants, it merely needs to wait until that regulation gets to the Office of Management and Budget where it can voice its objections quietly, and watch as the OMB staff delays the regulation or tailors it so that it is more to their liking.

You are to be congratulated, Mr. Chairman, for convening this hearing. By viewing these examples of what happens to certain regulations, you afford us the opportunity to get a close view of how Executive Order 12291 has functioned. It will afford us the opportunity to discuss the facts, not just the philosophy of this, and we can discuss it with the chief architect of that Executive order, James Miller, who now heads the OMB.

I briefly discussed earlier the result of the delay of one set of regulations by the Office of Management and Budget, the three major explosions at the ConAgra facility in Tennessee. What makes this disaster so tragic, and what renders it such an outrage, is that the Office of Management and Budget could have prevented its occurrence by obstructing the safeguards that would otherwise have been established.

In its investigation of this explosion in Knoxville, the Tennessee Occupational Safety and Health Administration found that there were dangerous levels of explosive grain dust at the facility, as well as inadequate ventilation. If either of these conditions had not been present, the accident, in all probability, would not have occurred.

It turns out that based on a national concern over just these kinds of explosions, the Federal Government's Office of Safety in OSHA had been trying to institute safety standards as far back as 1980. Based upon its own expertise and the advice of the National Academy of Sciences, they had come to some conclusions about safe levels of grain dust and adequate ventilation.

However, the standard could not be put in place because of the opposition of OMB. Under the system designed by Mr. Miller, OSHA submitted its regulations to OMB. The staff at OMB then proceeded to hold secret meetings with the industry representatives concerned, and OMB held up the regulation for almost 8 months. When they were through with it, it contained a major loophole.

If OMB had stayed out of the process, there would have been a Federal standard in time to prevent this occurrence in Knoxville.

Just as outrageously, even though 16 months have passed since that tragedy in Tennessee, the Government still doesn't have a standard. This committee has learned that in the current state of the draft regulation, because of OMB's continuing opposition to the original standard, the ConAgra facility would be exempted because of its size. OMB apparently feels that smaller fires in an explosion are all right. In fact, under the loophole and exemption contained in this draft regulation, most of the facilities in the country would be exempted. Of 11,000 facilities, 10,400 would be exempted.

In conclusion, Mr. Chairman, I want to again congratulate you and my colleague, Senator Levin, for the fine work that you have done in this area. I appreciate the opportunity to participate in this hearing, and I look forward to working with you to pass this legislation.

Senator **Durenberger**. Thank you, Al, very much.

Next, we will hear from Mr. Robert V. Percival. Mr. Percival currently serves as senior attorney of the Toxic Chemicals Program, a division of the Environmental Defense Fund. Previously, he served as special assistant to the Secretary of Education, and as clerk of to Justice Byron R. White, and before that to Judge Shirley Hufstedler.

Mr. Percival is the author, most recently, of the book entitled, "The Impact of Accidental Exposure and Experimental Data on Regulatory Policies." It must not be a book; you probably couldn't put out a book with a title that long. He is a graduate of Stanford Law School, lead attorney in *EDF* v. *Thomas*. With him today is Mrs. Barbara Fenster of Modesto, CA. We welcome both of you. Your statement, Mr. Percival, will be made part of the record, and you may proceed to try to summarize in 5 minutes.

TESTIMONY OF ROBERT V. PERCIVAL, SENIOR ATTORNEY, TOXIC CHEMICALS PROGRAM, ENVIRONMENTAL DEFENSE FUND, AND BARBARA FENSTER

Mr. **Percival**. Thank you, Senator.

I think that there is an interesting contrast between the testimony that Mr. Miller has submitted today and the testimony that we have submitted. Mr. Miller emphasizes how the OMB review process is supposed to work in theory; we describe how it actually works in practice.

As we demonstrate in our testimony, even though Mr. Miller has previously assured Congress that OMB's review cannot delay regulations subject to statutory deadlines, in fact, that happens all the time. OMB insists that it can indefinitely block any regulation it doesn't like.

Mr. Miller indicates that OMB reviews about 300 EPA regulations every year, but what he doesn't tell you is how many they block. OMB extended review to block publication of 196 EPA regulations during 1984 and the first three-quarters of 1985. This is the vehicle OMB uses to dictate changes in regulations. Even though OMB asserts that it is the agency's ultimate decision, OMB actually dictates the substance of regulations by telling the agency, "We are not going to clear these regulations until you voluntarily agree to adopt our changes."

Our testimony also demonstrates that OMB's main substantive concern has not been to use cost/benefit analysis to maximize net benefits to society, but rather just to save industry money regardless of the environmental or economic consequences.

Finally, because OMB operates in complete secrecy, it is extremely difficult to hold it accountable for its actions. OMB's penchant for secrecy was amply demonstrated in our lawsuit against them (*EDF* v. *Thomas and Miller*, No. 851747 (D.D.C)). OMB first tried to prevent all discovery by EDF. Then, once we obtained documents that revealed that OMB officials deliberately had tried to conceal their role in blocking the tank regulation, they tried to have our brief suppressed.

Mrs. Fenster is with me because she has been a victim of a preventable environmental accident. In fact, she has lived in a community for 19 years that was devastated by leaks of toxic chemicals from underground storage tanks. Fifty-eight thousand gallons of these toxic solvents leaked from underground tanks in her community. Yet we discovered in our litigation that it is OMB's position that EPA should not regulate to prevent all leaks from underground storage tanks because OMB does not think that all such leaks are bad.

That is not on the public record any place. I would simply ask the committee, if in fact OMB officials are so confident that they have good reasons to change these regulations, why are they afraid to come up with their reasons and put them on the public record.

The leak in Mrs. Fenster's community contaminated the water to over 800 times the health and safety action levels, resulted in a rate of spontaneous abortions in the community of about 21.5 percent, and a greatly excessive rate of congenital heart abnormalities and other birth defects. I would just turn it over to Mrs. Fenster now for her to explain to you the personal consequences of this environmental tragedy.

Senator DURENBERGER. Mrs. Fenster, welcome. Pull the mike up as far as is comfortable, I know that you don't do this every day. We welcome you to the committee and hope that you feel right at home here.

Mrs. FENSTER. Thank you.

I am here because of my grandson. I waited 20 years to have a grandchild and, of course, I was delighted.

My primary concern is that people on committees and so on and so forth are inundated by statistics and the cost of the cleanup. Nobody talks about the cost to the victims and their families, and the heartache that they endure, because you can't put a dollar sign on that.

I first became involved because my grandson, when he was born, the only birth defect he had was a heart murmur, and we were told that he would outgrow that, and there would be no problem. When he was 18 months old, he collapsed. We rushed him into the emergency room, and after the pediatrician on call saw him, she said that she was going to call a pediatric hematologist, which was also the oncologist.

I said, "Why?" She said, "We think it is leukemia." Later that afternoon, he underwent bone marrow tests, and we were told that we would have been fortunate had it been leukemia because it was treatable. What he had was an untreatable, rare blood disease called "transient erythoblastic anemia," which means that he could not produce his own red blood cells. His bone marrow couldn't.

They gave him a blood transfusion, and 4 days later, they sent him home to die. Fortunately, we had a miracle on Good Friday, and he started building his own red blood cells. However, his immune system is damaged, and he will always have a hard time. But because of that, I started to ask questions and I started to become involved.

I get hands over the heart with how much IBM has spent for cleanup, or Fairchild, but they don't see the children, the darling children that crawl around on all four and will drool all their lives, or the children who are born with their intestines on the outside, or heart surgery as a way of life.

Unfortunately, the birth defect study does not go beyond that, the birth defect. There is no indepth study on the things that have transpired which are very common. We have a map in the area that shows with different colored pins what ailments and how many deaths, and what is wrong.

Senator **Durenberger**. This is in the area around Modesto?

Mrs. **Fenster**. It is Fairchild, but it is not limited to that. It is all over. Where I have moved, I have found a great deal of thyroid cancer, and so on and so forth. I think the toxic chemicals vary, but I think the results are ultimately the same.

Testicular cancer among the young men, lupus, maybe five or six cases within a seven or eight-block radius. There are so many strange things. Liver cancer, and children with cyrrhosis of the liver, and things that are happening. It just can't be coincidence. I even had three dogs that died within 3 months of each other, two of them with cancer, and the other one with liver failure. My fish were deformed. Yet, they tried to placate me, and EPA has become a nasty name.

When I first received notice of my water contamination, I thew it away. My Government agencies will protect us, and that is the way that we, naive American, believe until it happens to you. All over the country these things are happening and they are, so-called, "isolated cases."

You see documentaries, and you see news items, however, if that were to go together and you could see a broad scope across the United States, like we have a map of Santa Clara County, I think you would find it very frightening. I think that the people have a right to know these things and to be protected by their agencies, which they are not doing now.

Senator **Durenberger**. Thank you very much.

Do you have any additional testimony, Mr. Percival?

Mr. **Percival**. No, sir.

Senator **Durenberger**. Since Jim Miller was up here last—and I hope that it wasn't the last time, for his confirmation hearing—we have been trying to arrange our schedule. And don't ask me how we arrived at this particular day, except that he didn't think that he would be doing anything today. When he was here the first time, and he wanted to be Director of OMB, we addressed some of these issues because he used to run OIRA. We talked about the delay in regulations, and several of us asked him about the delay in the turnaround time. He told me that the average was 13 days. I understand that in his testimony today, which apparently you have looked at, he puts that turnaround time somewhere between 7 days and 20 days. Your testimony is that as of May 9, 1985—that precedes his going back into OMB, and Dr. Gramm's going to OIRA—I guess, the average delay for the 24 EPA regulations to which OMB was extending its review was 71 days per each of those 24 regulations.

I don't know whether I am doing the wrong kind of averaging, or he is talking about apples and you are talking about oranges, but again we are playing with numbers and, as Mrs. Fenster illustrated, there are human lives behind all of this.

What is the reality of the problem as you see it with respect to OMB and the time delays or the turnaround?

Mr. PERCIVAL. Senator, OMB is very skillful at manipulating statistics, and I would submit that this is essentially what they have done in this case by looking at their average review time for all regulations.

Many of the regulatory actions that EPA submits to them are very insignificant matters that don't affect a nationwide consitituency, and those are cleared as a matter of course, which brings the average review time down to a relatively low number, although under his own statistics, it demonstrates that it takes OMB more than 30 percent longer on the average to review EPA regulations than non-EPA regulations.

The really significant thing to look at is when there is a significant regulation that OMB has some disagreement with, the delays can be astronomical. They can be not just several months, they can be yours.

There is an arsenic standard that OMB has held up for over 4 years. Mr. Miller argues, "We are not responsible for having these deadlines missed because a lot of the deadlines have expired before the regulation got over to OMB." In our view that is certainly no excuse for giving the OMB the right to further delay those regulations. But, actually, he is being quite misleading in his testimony when he makes that assertion.

As we demonstrated in our testimony, there were 11 new source performance standards that were submitted to OMB in proposed form months and months and months before the statutory deadline, yet OMB didn't like them, so in many cases it indefinitely delayed the proposed regulation, which allows Mr. Miller to say, "We didn't block the final regulation." Or they vetoed the regulation, sent it back to EPA, so that OMB can come before you and say, "Well, the regulation wasn't sitting over at OMB on the date that the deadline expired." But the reason is because it was vetoed and it is still not out years later.

So the thing to really look at is what happens to the significant regulations, not the overall average review time. OMB promised the Congress, after the Executive order was formulated, that if a regulation was subject to a deadline, it was going to be exempt from the OMB review process. Yet, we discovered during our litigation that they entirely ignore those deadlines today, and that OMB requires prepublication review and approval for all regulations.

That is the vehicle they use in order to dictate substantive changes in the regulations.

It is a clever fiction, if you will, for them to say that it is the agency's decision, but the reality, as demonstrated quite well by the statistics, is that so long as they can insist on indefinitely blocking regulations, they are able effectively to dictate the substance of those regulations.

They don't need all that time just to formulate their views and advice, and present those views to the agency to make its own decision. Instead, they hold the regulation until they have seen every single line of the proposal, and have dictated precise changes in it to conform with their views.

Senator DURENBERGER. The Levin-Rudman-Durenberger et al. rulemaking bill of 1986 has a 60-day deadline. Is that inappropriate for some areas? What would you say about that?

Mr. PERCIVAL. It would certainly be of some help because it would deal with the problem of regulation for which there is no statutory deadline. I think the asbestos regulation was a good example of that.

OMB has succeeded in delaying for 2 years just the proposed regulation, no telling what they might do with the final regulation when it comes around to them next year. Having a 60-day deadline on all regulations would be helpful, but there is also a question of why OMB even needs any additional time in dealing with proposed regulations.

Senator DURENBERGER. I think that it is going to be Miller's position: you don't have to give us deadlines because, in fact, the agencies don't have to listen to our advice anyway. I am trying to learn if you know why these agencies are always kowtowing to OMB.

I think the theory at OMB is that they are not stopping anything; OMB is there to give advice, and the agency heads can go right ahead and do what they please. I haven't looked into why, all of a sudden, we have asbestos regulations. I have had three hearings in three different committees on the issue of asbestos, and all of a sudden I pick up the newspaper, and here are the regulations. I don't know how it happened, but whammo, it happened. Is that because Jim Miller told the Administrator of EPA to get our the regulation, or that it was OK to get them out, or because EPA just said, "To heck with OMB, we are going to get them out"?

Mr. PERCIVAL. Senator, it was a circumstance where there was sufficient congressional pressure brought to bear that OMB could no longer idefinitely delay the regulations.

Senator DURENBERGER. Do you mean that the three hearings really helped?

Mr. PERCIVAL. They helped. They worked. It doesn't mean that there wasn't still 2 years of delay just for getting the proposal out. There should not have to be a full-scale congressional investigation every time a regulatory matter is blocked by OMB. There should be clear limits on their ability. In fact, the reality is that the EPA official who we deposed in our litigation said that when he got the notice back from OMB saying, "We are extending review of the hazardous waste tank regulation," it was his view that he didn't have the authority to publish the proposed regulation because it would defy the Executive order.

The Executive order specifies that if OMB extends its review, the agency shall "refrain from publishing the regulation until OMB's review is completed." Having at least a 60-day deadline would be helpful in the sense that the agency could then say, "OK, we have heard your views, and we decided to either accept or reject them, but we are going to go ahead with the regulation."

There really is a question for proposed regulations as to why even build in that extra 2 months delay. OMB can participate in the rulemaking process. They can submit comments to the agency throughout the rulemaking process. So a significant question is why we even need to have an extra 2 months delay to get the proposal out.

Senator DURENBERGER. I have used up my time.

Senator LEVIN. Can you tell us what changes were made in the rule from the proposed rule to the final one?

Mr. PERCIVAL. Certainly. EPA, in the hazardous tank regulation, had decided that the best way to protect human health and the environment, which is the statutory language, would be to prevent all releases of hazardous wastes from tanks by requiring secondary containment and leak detection devices, so that if the tank started to leak, it would not escape into the environment, it would be contained and the leak detection device would notify the owner of the tank that he had a problem.

OMB thought that that was far too expensive and instead what the agency should do—instead of promulgating national standards that are uniform and require a floor level of protection, the agency should do individualized risk assessments. It was OMB's view that EPA's goal should not be to prevent all leaks, that some leaks might not be so bad unless their risk assessment could demonstrate that it was likely to harm human health.

In other words, whether or not EPA was going to be preventing those leaks would depend on where you lived, and what risk assessment factors OMB had plugged into their risk assessment models. So OMB directed EPA to change the entire philosophy behind the standards. Anywhere in the standard where it said, "Our goal is to prevent leaks," that was changed to just say, "Our goal is to protect human health and the environment," begging the question of what the proper way to protect human health and the environment was.

Senator LEVIN. Was that action of OMB oral, written, or what?

Mr. PERCIVAL. OMB's communication with EPA was entirely oral. The only way in which we were able to discover it was by obtaining internal OMB documents through the litigation that are not in the public record of the rulemaking. In fact, those documents indicated that OMB officials were afraid that we were going to file this law suit. Those documents indicate that OMB wanted their changes in the regulation not to be dictated in writing because of their fear that they subsequently might be subject to a lawsuit that would uncover them.

Senator LEVIN. You said that they wanted their changes not to be in writing. OMB directed or told the agency over the phone not to make written——

Mr. **Percival**. The OMB documents indicate that because they knew EDF was interested in these regulations, it might not be advisable to submit their changes to the regulations in writing.

Senator **Levin**. It might not be advisable for OMB?

Mr. **Percival**. For OMB to submit the changes to EPA in writing.

Senator **Levin**. The changes that it was recommending.

Mr. **Percival**. Right.

Senator **Levin**. That was a written comment on some internal OMB document?

Mr. **Percival**. Yes. I can't go into more detail because the document is under seal with the court. That was the compromise that was reached in order to allow us to have access to those documents. I can't quote the document itself, but as we indicated in the litigation that was the substance of the document.

Senator **Levin**. Are you able to say who made that comment on that document?

Mr. **Percival**. You could find that through our briefs, who wrote the memorandum.

Senator **Levin**. I mean, are you able to say who made the indication about not doing this in writing?

Mr. **Percival**. Yes, the author of that memo is indicated in our briefs, it is an OMB official.

Senator **Levin**. Is that something that you are able to tell us here without violating a court understanding or order?

Mr. **Percival**. I wouldn't want to go into any more detail than that, but it is available. OMB tried to suppress our brief in response to that because they wanted to keep this matter concealed.

Senator **Levin**. Thank you.

Senator **Durenberger**. Senator Gore.

Senator **Gore**. Thank you very much, Mr. Chairman.

Mr. Percival, earlier I referred to my belief that OMB's exercise of this regulatory power is unconstitutional. You are a party to a law suit that makes that same point. As the senior attorney for EDF, you are now litigating a law suit in which one of the issues is the constitutionality of OMB's role in this regard; correct?

Mr. **Percival**. The constitutional issue comes up on the sense that unless OMB is required to adhere strictly to the limits of the Executive order, the order is clearly unconstitutional. What we have told the court is that you don't have to decide the constitutionality of the Executive order if you decide that OMB cannot block regulations that are subject to deadlines. But if you accept OMB's argument, which is that they have the authority to do this anyway, then it clearly is in excess of the President's article II powers, and that makes the Executive order unconstitutional.

Senator **Gore**. In response to your argument, the Department of Justice has made a rather extraordinary claim. The Department of Justice, in its brief to the court, says:

> An agency head is legally free to ignore the Executive order's directive and exercise his discretion to promulgate a regulation without subjecting it to OMB review.

Do you believe that assertion by the Department of Justice?

Mr. **Percival**. No; that is entirely a fiction. It is constructed in order to try and preserve the legality of the Executive order. We demonstrated quite clearly in the litigation that that is not the way the process operates in practice.

Senator GORE. We have to say it in a nice way, but essentially they have lied to the court.

Mr. PERCIVAL. They have spoken out of both sides of their mouth. On the one hand, they say, it is voluntary, you can ignore it, and, on the other hand, they have later taken the position in the litigation that even after the deadline expired, agency heads are required to abide by the Executive order. There is no way to reconcile those two positions.

Senator GORE. Hopefully, the court will pierce the veil of deceit and find that is in fact the agency head is not free to ignore the Executive order. OMB forces compliance with the Executive order, and in so doing it violates the Constitution. It exercises an extraconstitutional power.

That raises the only concern that I have with this legislation introduced yesterday. If you believe, as I do, that the entire scheme is unconstitutional, should you rehabilitate this scheme by establishing a deadline and thereby constructively acknowledging the right of the executive branch to exercise power in this fashion?

Mr. PERCIVAL. Senator, I think that this is a very important point, and one that requires you to be very careful in the way that this legislation is drafted. Congress certainly has power to correct constitutional abuses. This legislation certainly can be drafted in a way that says, we in no way confirm the legality or propriety of this process, however, knowing full well that there are certain abuses, we want legislatively to outlaw this particular abuse, while leaving the larger constitutional issue to the court to resolve.

I think that it is very important that the legislation indicate that it is not in any way confirming the legality or constitutionality of the Executive order.

Senator GORE. I would like for you to elaborate on your response for the record, and I would invite other witnesses, to the extent that the chairman will allow them to do so, to also respond to this point. I am concerned that even that approach might carry with it some problems, but I want to know the views of the witnesses who have appeared here on that.

Senator DURENBERGER. We will incorporate that in the set of questions asked of each of the witnesses.

Senator GORE. Thank you, Mr. Chairman.

Senator LEVIN. Would you yield for just one second?

Senator GORE. Certainly.

Senator LEVIN. The bill does again state that we are not taking any position relative to the constitutionality of the Executive order.

Mr. PERCIVAL. It is particularly important because in our litigation OMB, for example, argued that the mere fact that Congress was aware of the Executive order process means that they somehow acquiesced in delays despite congressional deadlines, even though the House committee report that Senator Gore helped to author said specifically, "Nothing in this is designed to allow OMB to use the Executive order to delay EPA's ability to promulgate these regulations."

Senator GORE. I support the thrust of this legislation, but I am very concerned about the constitutionality of the OMB practices. I think that they are unconstitutional as I have said on several occasions, and the fact that the Justice Department has to deceive a Federal court, or tried to deceive a Federal court by saying something that is patently false in order to try to rehabilitate its constitutionality serves as further evidence of the fact that it really just ought to be stopped and not sort of massaged. However, it would be better to have these kinds of deadlines if we can't get rid of the thing altogether.

One brief final question, Mr. Chairman.

You mentioned in your testimony that cost-benefit analysis, the way it is performed by OMB, is a sham. Are you familiar with the form that was used to calculate the costs and benefits which showed that the costs were calculated, but they didn's even go to the trouble of calculating the benefits?

Mr. PERCIVAL. That is quite frequently done with environmental regulations, and it means that the process is inherently biased against regulations like the lead regulation, even though when you really do it right, you will find enormous net benefits to society.

Senator GORE. If you calculate only the costs and not the benefits, then the entire procedure is simply a sham.

Mr. PERCIVAL. Exactly.

[Prepared statement of Robert V. Percival follows:]

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TESTIMONY OF
THE ENVIRONMENTAL DEFENSE FUND
Before the
Subcommittee on Intergovernmental Relations
# of the
Senate Committee on Governmental Affairs
on
THE ROLE OF OMB IN REGULATORY REVIEW

January 28, 1986

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My name is Robert V. Percival. I am a senior attorney with the Toxic Chemicals Program of the Environmental Defense Fund (EDF). Thank you for inviting me to testify today.

EDF is a non-profit, national environmental organization with more than 50,000 members. For nearly two decades EDF has played a leading role in efforts to protect public health through improved regulation of toxic substances. I represent EDF in Environmental Defense Fund v. Thomas and Miller, Civil Action No. 85-1747 (D.D.C.), a lawsuit that challenges the authority of the Office of Management and Budget (OMB) to delay and to interfere with EPA's efforts to promulgate environmental regulations.

The subject of these hearings - OMB's role in regulatory review - is enormously important. One need not question the President's authority to coordinate regulatory decisions by executive agencies in order to be concerned about OMB's actions. For the role that OMB actually has played in the regulatory process is far different from that outlined in the executive orders that authorize OMB review. As EDF's lawsuit has documented, OMB has used the regulatory review process to block and to weaken environmental regulations in defiance of statutory directives. Even though OMB has no authority to act in this manner, until now there have been few mechanisms for holding OMB accountable because of the extreme secrecy in which OMB operates.

It is important that OMB be held accountable for its actions not simply out of respect for law, but also because what OMB does behind closed doors has a direct impact on the health and safety of people throughout the nation. Accompanying me today is Mrs. Barbara Fenster from Modesto, California. She will tell you in her own words just how great the human costs of OMB's actions can be. For nineteen years Mrs. Fenster lived in South San Jose, California, in the heart of Silicon Valley. Her home was located in the vicinity of the Fairchild and IBM plants where toxics chemicals leaking from underground storage tanks devastated an entire community. She can describe for you the human toll exacted from her family, friends and neighbors by a tragedy that could have been prevented by proper environmental regulation.

While I am not here to tell you that OMB is responsible for all the suffering that Mrs. Fenster has witnessed, I can tell you how OMB's actions have frustrated Congress' efforts to ensure that leaking underground storage tanks will not cause similar tragedies in the future. I can also describe for you the legal action EDF is taking to correct OMB's abuses and the response that it has elicited from OMB, which deserves particularly close scrutiny by this Subcommittee.

I. THE PURPORTED ROLE OF OMB IN THE REGULATORY PROCESS

OMB's purported role in the regulatory review process is outlined in two executive orders. Executive Order 12291, which was promulgated on February 17, 1981, and Executive Order 12498, promulgated on January 4, 1985, require executive agencies to submit proposed and final rulemaking actions to OMB for review prior to their publication. These executive orders give OMB an expansive role in regulatory review, but they also acknowledge important legal limits on OMB's authority. While these limits have been recognized to be crucial to the legality of the executive orders, they have not been honored by OMB in practice.

A. Regulatory Review Provisions of the Executive Orders

Executive Order 12291 requires executive agencies to submit all proposed and final regulations to OMB for review prior to publication. Major rules, which are defined as rules with an annual effect on the economy of $100 million or more, must be accompanied by a detailed cost-benefit analysis, known as a regulatory impact analysis. The regulatory impact analysis and notice of proposed rulemaking are to be submitted to OMB at least 60 days prior to publication. For non-major rules, all notices of proposed rulemaking and final rules are to be submitted to OMB at least 10 days prior to publication.

OMB's review of regulatory actions is to be based on a set of substantive criteria outlined in the executive order. These criteria direct OMB "to maximize the net benefits to society" of regulatory action. Executive Order 12291, Sec. 2(c).

In theory, OMB review under Executive Order ı2291 is to occur shortly before publication of proposed and final rules and is to be completed expeditiously - within ten days for non-major rules, and within thirty or sixty days for major rules. However, the executive order provides that if OMB notifies an agency that it is extending its review beyond the normal 10-day or 60-day review period, the agency shall "refrain from publishing" the rule until OMB review is concluded. Executive Order 12291, sec. 3(f).

Executive Order 12498 authorizes OMB review of potential agency rulemaking actions up to a year in advance. Agencies are required annually to submit to OMB for review a "draft regulatory program" that describes all "significant regulatory actions" the agency intends to undertake during the next year. "Significant regulatory actions" are defined by OMB to include even actions taken to consider whether to initiate a rulemaking and actions to develop guidelines, policy proposals or similar documents that may influence rulemaking at a later date. OMB is authorized to review each agency's regulatory program to determine if it is consistent with the Administration's policies and priorities. Actions approved by OMB are incorporated into the Administration's "Regulatory Program," which will be published annually. Agencies are prohibited from taking any significant regulatory action that is materially different from that contained in the "Regulatory Program" unless specific OMB approval is obtained.

B. Limits on OMB's Authority under the Executive Orders

The broad scope of OMB's review powers under the executive orders poses potentially serious legal and constitutional difficulties. Although the President has authority to supervise the actions of executive agencies, his exercise of this authority must conform to the legislative directives of Congress. He may not direct executive agencies to take actions that are inconsistent with the commands of Congress nor may he usurp decisionmaking functions delegated by Congress to particular executive agencies.

Executive Order 12291 purports to recognize the limits of the President's supervisory authority by providing that OMB actions under the order are authorized only "to the extent permitted by law." Executive Order 12291, Sections 2, 3(a), 6(a), 7(e). It also specifies that nothing in the order "shall be construed as displacing the agencies' responsibilities delegated by law." Section 3(f)(3). To prevent OMB review from conflicting with congressional or judicial directives, the executive order exempts from OMB review "[a]ny regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order." Section 8(a)(2).

The Department of Justice placed considerable emphasis on these provisions in its opinion supporting the legality of Executive Order 12291. The Department concluded that "it is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress." Thus, "[i]n issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." The Justice Department's opinion concluded that because OMB review under the Executive Order would only be "advisory and consultative" and would not include authority to reject an agency's ultimate judgment about regulatory actions, the order was legal. U.S. Department of Justice, Office of Legal Counsel, "Proposed Executive Order Entitled 'Federal Regulation'," Feb. 13, 1981, in Role of OMB in Regulation, Hearings before the Subcomm. on Oversight & Investigations of the House Comm. on Energy & Commerce, 97th Cong., 1st Sess., June 18, 1981, at 486.

In testimony before Congress shortly after Executive Order 12291 was issued, OMB officials emphasized the importance of construing narrowly the authority granted to OMB under the order. James C. Miller III, who was then serving as Administrator of OMB's Office of Information and Regulatory Affairs, testified:

> "President Reagan's Executive order imposes requirements on the agencies only 'to the extent permitted by law' and only to the extent that its terms would not 'conflict with deadlines imposed by statute or by judicial order.' The limited application of [Executive Order 12291] is a crucial point, one that ensures [its] legality and the legality of actions pursuant to it. If a statute expressly or by necessary implication prohibits the consideration of benefits or costs or alternatives by an agency during its rulemaking, then those provisions of Executive Order 12291 imposing them would not apply.

> If a statute or court order establishes a date for a rulemaking action, then Executive Order 12291 cannot delay that action. In other words, if Congress or the courts have spoken on the matter, then the Executive Order process will conform to that expression, not contradict it." Testimony of James C. Miller III, in Role of OMB in Regulation, Hearing before Subcomm. on Oversight and Investigation of House Comm. on Energy & Commerce, 97th Cong., 1st Sess. (1981) at 46.

Similar assurances were provided to Congress when Executive Order 12498 was adopted. Like Executive Order 12291, Executive Order 12498 grants OMB authority to carry out its provisions only "to the extent permitted by law." Executive Order 12498, Sec. 4. It also exempts regulations subject to statutory or judicial deadlines from its prohibition on rulemaking actions that have not been approved by OMB and incorporated into the "Regulatory Program." Sec. 3(c). Thus it purports to recognize legal limits on the extent of OMB's authority to control agency rulemaking actions.

Unless the executive orders are construed to contain these limits, they would be unconstitutional for they would exceed the scope of executive power under Article II of the Constitution. As the Supreme Court held in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), the President's powers under Article II of the Constitution do not permit him to authorize executive officers to act in a manner that is inconsistent with policies set by Congress.

II. THE ACTUAL ROLE OF OMB IN THE REGULATORY PROCESS

Despite the assurances of Director Miller and the Justice Department, OMB has ignored the limits of its authority under the executive orders governing regulatory review. Rather than simply performing the "advisory and consultative" role contemplated by the executive orders, OMB has used the regulatory review process to block and to delay regulatory actions required by Congress and to displace agency decisionmaking by dictating substantive changes in regulations. OMB's primary goal has not been the maximization of net benefits to society, but rather the reduction of costs to industry. Because of the extreme secrecy in which its actions are cloaked, OMB has been able to exceed its authority with impunity, reducing public confidence in the regulatory process and destroying accountability for regulatory decisions.

A. OMB Has Blocked Promulgation of EPA Regulations Despite Statutory Deadlines.

Despite Director Miller's assurances that the regulatory review process will conform with congressional directives, OMB officials have used it to delay or to block publication of regulations they oppose in defiance of clear statutory mandates. Although the executive order expressly exempts from OMB review regulations for which such review would conflict with statutory deadlines, OMB ignores this exemption and uses the executive order review process to block regulations despite statutory deadlines.

1. Standards for hazardous waste in tanks

OMB's actions to block EPA from publishing proposed permitting standards for underground tanks storing hazardous waste despite a statutory deadline are what precipitated EDF's lawsuit against OMB. Under Section 3004(w) of the Resource Conservation and Recovery Act, 42 U.S.C. 6924(w), EPA was required by Congress to promulgate permitting standards for hazardous waste in underground tanks by March 1, 1985. Congress established this deadline because of the importance of these standards to prevent the kind of toxic leaks that have devastated Mrs. Fenster's neighborhood and other areas.

Despite the statutory deadline, OMB required EPA to submit its notice of proposed rulemaking to OMB for review under Executive Order 12291. EPA submitted the notice of proposed rulemaking to OMB for review on March 1, 1985, the date of the congressional deadline. Even though OMB staff were acutely aware that the statutory deadline had expired, they waited for six weeks before giving EPA staff any formal comments on the proposed regulations. Because OMB staff disagreed with several aspects of EPA's proposal, they refused to approve it for publication in the Federal Register. OMB notified EPA that it was invoking the extended review provisions of the executive order in order to prohibit EPA from publishing its proposal. Thus, even though the statutory deadline had expired, OMB invoked the executive order to prohibit EPA from taking action required by Congress.

OMB staff refused to clear the proposed regulations in their original form and insisted that EPA make significant changes in them. EPA staff submitted revised regulations to OMB for review on May 10, 1985. OMB still was not satisfied with the revised regulations and they insisted on further changes. Only after EDF and two of its members filed a lawsuit against both EPA and OMB on May 30, 1985 did OMB permit EPA to publish the proposed standards. But OMB first dictated still further changes in the proposed standards before they were published on June 26, 1985.

EDF's lawsuit, EDF v. Thomas, Civil Action No. 85-1747 (D.D.C.), is the first case challenging OMB's authority to block or to delay regulations beyond statutory deadlines. EDF is asking the Court to declare that OMB has no authority to block publication of regulations beyond the date of a statutory deadline and to prohibit OMB from requiring its review and approval of the final tank standards and other, similar regulations after statutory deadlines have expired.

OMB is unable to articulate any source of authority that permits it to block publication of regulations after a statutory deadline has expired. However, it argues that Congress somehow has acquiesced in OMB's actions because "Congress was aware of the President's program under Executive Order 12291 when it passed the 1984 RCRA Amendments" that contained the statutory deadline for promulgating the tank standards. Governments' Memorandum of December 12, 1985, in EDF v. Thomas, No. 85-1747, p. 9. This argument is an affront to Congress, which need not assume, when it enacts statutory deadlines, that unless it specifically prohibits OMB from violating them, they can be disregarded by OMB. Moreover, the House Committee report on the 1984 RCRA Amendments specified that EPA's ability to meet "all deadlines in this bill, shall not be impaired in any way whatsoever by Executive Order 12291." Report of the House Comm. on Energy & Commerce, Hazardous Waste Control and Enforcement Act, 98th Cong., 1st Sess., May 17, 1984, at 35. Thus, although Congress has spoken clearly on this very issue, OMB has defied Congress and violated its prior assurances that its review of regulations would not conflict with statutory deadlines. (Copies of two of EDF's briefs in EDF v. Thomas, No. 85-1747, which discuss the limits of OMB's regulatory review authority, are being submitted for the record).

OMB also argues that the regulatory review process is voluntary and that nothing prohibits EPA from publishing regulations without OMB approval. This argument is a complete distortion of the realities of the OMB review process. Under section 3(f) of Executive Order 12291, agencies are directed that after OMB has extended its review, they must "refrain from publishing" regulations until OMB completes its review. The Director of EPA's Office of Solid Waste, who was responsible for the tank regulations, testified that once OMB had notified him that it was extending review "I did not have the authority to cause the regulation to be promulgated until the review was completed." Deposition of John Skinner in EDF v. Thomas, No. 85-1747, p. 111.

2. Other regulations

OMB completely ignores the procedures established by Executive Order 12291 to prevent OMB review from conflicting with statutory deadlines. Section 8(a)(2) of the executive order provides that such conflicts are to be reported to OMB and a statement is to be published in the Federal Register explaining why the normal review procedures cannot be followed. OMB's own Form 83, "Request for OMB Review," and the agency's Regulatory Docket Worksheets contain a box marked "Statutory or Judicial Deadline," which is checked when a rule is not submitted to OMB for review prior to publication because of a deadline. OMB ignores this procedure entirely, as indicated by the fact that OMB's Regulatory Docket Worksheets treated the tank standards as a "Standard" submission even though EPA had checked the "Statutory or Judicial Deadline" box on Form 83.

In response to EDF's discovery requests, OMB and EPA admitted that they have no formal procedures outlining the circumstances under which OMB review is to be bypassed pursuant to section 8(a)(2) of Executive Order 12291 in order to comply with statutory deadlines. Both OMB and EPA were unable to cite a single instance in which the procedures of section 8(a)(2) were followed. In fact, EDF discovered that OMB apparently has no way of identifying regulations subject to statutory deadlines in their computer tracking system. OMB's annual reports reveal that there have been only five instances - and none since 1983 - in which OMB has even acknowledged that its review of EPA regulations has been affected by a statutory or judicial deadline. In at least one of these instances, OMB sought to block publication of regulations required by a court order.

OMB's current practice is to require its prepublication approval for all EPA regulations, regardless of statutory or judicial deadlines. In response to a discovery request in EDF's litigation, EPA identified a partial list of 169 proposed or final EPA regulations subject to statutory or judicial deadlines which EPA had been required to submit to OMB for prepublication review under Executive Order 12291. EPA Response to Plaintiffs' Interrogatory #10, EDF v. Thomas, Civil Action No. 85-1747 (D.D.C.). On 86 occasions OMB extended its review beyond the time periods outlined in the executive order despite the deadlines. In many cases OMB review extended EPA's promulgation of the regulations beyond the date of the deadline either because the regulations were submitted to OMB after the deadline had expired or because OMB extended its review beyond the deadline or vetoed the regulations prior to, or after, the deadline.

OMB argues that once a statutory deadline has expired, there is no conflict between OMB review and the deadline and that agencies are required to adhere to the review process established by Executive Order 12291. This argument not only contradicts OMB's claim that the process is voluntary, but it defies common sense. A statutory deadline imposes a continuing obligation on an agency that is not relieved once the deadline has been missed. However, OMB apparently believes that it may block regulations indefinitely regardless of statutory deadlines once a deadline has expired. For example, OMB's review of the national ambient air quality standards for nitrogen oxides blocked publication of the standards for more than seven months for the proposed standard (from June 22, 1983 to January 26, 1984) and for more than six months for the final standard (from November 20, 1984 to May 24, 1985), even though the statutory deadline had expired several years previously (December 31, 1980). EPA's December 6, 1985 list of OMB's Extended Reviews indicates that OMB has been blocking publication of an arsenic standard since last February and a new source performance standard since last March, even though the statutory deadline for each expired more than two years ago.

Although OMB claims that it has only rarely held a regulation at OMB on the date the deadline passed, this claim is false and grossly misleading. For example, eleven new source performance standards (NSPS) required by the Clean Air Act were submitted to OMB for review well before the statutory deadline of August 7, 1982 had expired (including NSPS's for rubber tire manufacture, beverage can containers, metallic minerals processing, large appliance coating, asphalt processing, volatile organic liquid storage vessels, stationary internal combustion engines, flexible vinyl coating and printing, publication rotogravure, and metal coil coating). Yet in every case OMB extended its review beyond the statutory deadline or completed its review by vetoing the regulation and sending it back to EPA. The beverage can containers regulation was vetoed twice by OMB during nearly two years of review, and the stationary internal combustion engine regulations apparently have been at OMB for more than four years (since July 8, 1981).

Unless EDF is successful in obtaining judicial relief against OMB, the agency is likely to continue to block publication of regulations beyond statutory deadlines. EPA already has identified several regulatory actions subject to statutory deadlines in the new RCRA legislation that it is unlikely to be able to meet. See Letter of August 19, 1985 from J. Winston Porter to Hon. Robert T. Stafford. Yet EPA intends to submit each of these regulatory actions to OMB for review under Executive Order 12291, despite the Section 8(a)(2) exemption. Thus OMB will have further opportunities to delay RCRA regulations in violation of Congressional directives. Although OMB has told the court in EDF v. Thomas that it will not "unjustifiably" block EPA's publication of regulations beyond deadlines, OMB apparently believes that all its past actions have been justifiable. Thus, it is arguing for nothing less than the right to have complete discretion to block regulatory action indefinitely regardless of any deadlines Congress has enacted.

B. OMB Has Dictated Substantive Changes in Regulations, Displacing Agency Decisionmaking.

The delays generated by OMB's actions to block publication of EPA's regulations are only part of the problem. The primary purpose behind the delays is OMB's desire to dictate changes in the substance of regulatory actions. OMB uses its ability to block regulations indefinitely as a vehicle to force agencies to make significant regulatory changes that the agencies otherwise would not make. This is directly contrary to the provisions in both executive orders stating that they do not authorize OMB to displace the agencies' responsibilities dicated by law. OMB's influence has become so pervasive that agencies now often tailor the substance of their regulatory proposals to conform to OMB's desires even before the proposals are sent to OMB for review.

OMB's efforts to substitute its own policy judgments for those of the agencies charged by Congress with decisionmaking responsibility are particularly egregious in light of OMB's lack of expertise in health and environmental matters. For the most part, OMB reviews of EPA regulatory proposals are performed by low-level desk officers who have little expertise in scientific, public health or environmental matters. Not infrequently OMB staff insist that EPA base its regulatory decisions on factors that are inconsistent with the underlying regulatory statute. See Testimony of John E.

Daniel, in Subcomm. on Oversight & Investigations of the House Energy & Commerce Comm., Hearings on "EPA: Investigation of Superfund and Agency Abuses," 98th Cong., 1st Sess., Sept. 27, 1983, at 80-32.

1. Hazardous waste tank standards

OMB's review of the proposed permitting standards for underground tanks storing hazardous waste illustrates how OMB has abused its review power in an effort to substitute its judgment for EPA's. Prior to submitting the proposed standards to OMB for review, EPA determined that the best regulatory strategy for protecting the environment against leaks in underground storage tanks was to require secondary containment for such tanks. This approach would permit leaks to be discovered before the toxic chemicals are released into the environment. EPA considered varying control requirements for tanks based on site-specific circumstances but it decided that this would be too expensive to implement and would not provide adequate protection for the environment. OMB, however, objected to the "containment philosophy" behind EPA's proposal. OMB does not believe that it is always desirable to prevent leaks of toxic substances from underground tanks. EPA's "overall strategy for hazardous waste storage facilities is based on a policy decision that the best way to accomplish the statutory goal of protecting human health and the environment is to contain the waste for the term of storage." 50 Fed. Reg. 26446. But OMB disagreed with this approach because OMB believes that only leaks of hazardous waste that can be demonstrated by risk analysis to harm human health should be contained. Thus OMB insisted that "any place in the preamble [of the proposed tank regulations] where it was stated that the intent of these regulations is 'to prevent releases to the environment'" be "changed to 'to protect human health and the environment'." Exhibit PA-6, in

EDF v. Thomas, No. 85-1747, p. 3. OMB also insisted that EPA base its standards on risk assessments and that it vary the standards to permit weaker regulations to apply on the basis of site-specific factors. Thus OMB dictated to EPA how to interpret its statutory mandate under RCRA, rejecting EPA's approach.

OMB argues that it does not displace agency decisionmaking because EPA is free to reject OMB's changes. However, unless EPA agrees to accept OMB's changes, OMB can block any regulatory action by EPA indefinitely. This is the strategy OMB uses to dictate the substance of agency decisions. OMB review is extended indefinitely until the agency agrees to the changes sought by OMB. If the agency resists, the regulations can languish under extended review for months and even years.

It is clear that this is precisely what occurred with the tank standards. OMB extended its review of the tank standards not simply to give it more time to prepare its "advice," but also to ensure that its "advice" was adopted by EPA. OMB refused to complete its review of the standards until it was satisfied that all the changes sought by OMB had been made in EPA's proposal. After EPA submitted a revised proposal on May 10, 1985, OMB insisted on still further changes. On June 4, 1985, OMB staff met with EPA staff to dictate the "fixes needed for clearance." Exhibit SA-13, in EDF v. Thomas, No. 85-1747. OMB staff insisted on approving word-for-word changes in the proposed regulations. A handwritten note informed the Director of EPA's Office of Solid Waste on June 6, 1985, that "OMB has concurred on the revised tank package provided you agree to the following attached changes." Exhibit SA-15, in EDF v. Thomas, No. 85-1747. No credible argument can be made that OMB did not dictate substantive changes in the standards simply because EPA agreed to adopt them as the price for obtaining OMB clearance.

2. Other regulations

The fact that OMB abuses the regulatory review process to dictate substantive changes in regulations is reflected by the frequency and length of extended reviews under Executive Order 12291. If OMB's input was simply "advisory and consultative," as OMB claims, there would be no reason for OMB review to extend beyond the time necessary for OMB to formulate its views and to communicate them to the agency whose regulations are at issue. Once OMB had communicated its views to the agency, the agency would be free to accept or reject them. Instead, OMB refuses to "clear" regulations until the agency has amended them to adopt OMB's views. As a result, OMB invokes the extended review provisions of the executive order to prevent agencies from publishing regulations until OMB's views have prevailed.

OMB now extends its reviews so frequently that EPA keeps a running tally of "OMB Extended Reviews" and the resulting delays they generate. These documents, which EDF obtained in the tanks litigation, show that as of May 9, 1985, the average delay for the 24 EPA regulations for which OMB was then extending review had been 71 days per regulation and that total delays exceeded 1,600 days.

OMB's propensity to invoke the extended review provisions of Executive Order 12291 is not a new phenomenon. In response to a questionnaire from a House subcommittee, EPA reported in May, 1983 that in the first two years of experience under the executive order OMB extended its review of 73 of EPA's proposed rules and 85 of EPA's final rules. Letter of May 26, 1983 from Joseph A. Cannon to Hon. Sam B. Hall, Jr., in "Regulatory Reform Act," Hearings before the Subcomm. on Admin. Law & Gov'tal Relations of the House Judiciary Comm., 98th Cong., 1st Sess. (1983), at 1561-62.

Extended reviews of EPA regulations recently have become even more frequent at OMB. During 1984 and the first three quarters of 1985, OMB extended its review of a total of 196 EPA regulations. OMB Regulations Tracking System, Environmental Protection Agency, November 12, 1985. While the number of EPA regulations for which OMB has extended review is only a small percentage of all EPA regulations submitted to OMB, this is due to the fact that most of the hundreds of EPA regulations submitted to OMB are of minor significance. The number of EPA regulations subject to extended review is a much larger percentage of significant EPA regulations submitted to OMB. Olson, "The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12291," 4 *Va.J.Nat.Res.L.* 1, 44 n.216 (1984) (a copy of this article is being submitted for the record).

OMB's routine use of the extended review provisions of Executive Order 12291 has become so egregious that last summer EPA's Acting Assistant Administrator for the Office of Air and Radiation wrote to OMB to protest extended OMB delays in reviewing Air Office regulations. He noted that the "official review times for our regulations are being grossly exceeded," that OMB is slow to review proposals, that "issues are slow to surface, then are rarely resolved or elevated to decisions on any timely basis and only then after constant badgering from my staff."

Extended reviews occur most frequently for programs that OMB strongly dislikes. OMB vehemently opposes many of the changes in hazardous waste regulations mandated by the recent amendments to the Resource Conservation and Recovery Act (RCRA). When Congress reauthorized this Act in November, 1984, it mandated significant changes in the federal regulatory program and set tight deadlines for promulgation of a variety of new regulations. OMB, however, is extremely hostile to the RCRA program and already has delayed its implementation substantially. Between September, 1984 and September, 1985, OMB has extended its review of 38 out of 50 RCRA and CERCLA regulations submitted to it by EPA for review under Executive Order 12291.

Shortly after the new RCRA legislation was signed into law, EPA sought to revise its existing hazardous waste regulations to reflect the new amendments. This regulatory action, which became known as the "codification rule," was designed simply to codify the new amendments in order to reflect provisions that have immediate or short-term effects on the regulated community. When EPA sought to publish these amendments in January, 1985, OMB objected. OMB forced EPA to remove many of these amendments and delayed publication of the rest of the regulatory package until July, 1985. At the request of the Department of Energy, OMB insisted that EPA suspend the requirements for corrective action to cleanup contamination at federal facilities. EPA now reportedly will have to perform regulatory impact analyses before it can even propose several regulatory changes required by the new statute. Thus, OMB has frustrated the intent of Congress and has delayed implementation of the new RCRA requirements.

EPA's recent decision to propose a phaseout of commercial uses of asbestos demonstrates that it is possible for EPA to prevail over OMB only when congressional pressure effectively exposes OMB's actions. In May, 1984, EPA sent OMB a notice of proposed rulemaking and a regulatory impact analysis for a proposed rule to ban certain commercial uses of asbestos. EPA had briefed OMB staff on this proposal two months prior to submitting it to OMB for review under Executive Order 12291. In August, 1984, EPA also sent OMB a notice of proposed rulemaking for a ten-year phaseout of asbestos mining and importation. These rules, which had been under development for nearly five years, were designed to accomplish precisely the kind of comprehensive, preventive regulation for which the Toxic Substances Control Act (TSCA) was enacted. Because these is no safe level of exposure to asbestos and yet substitutes for commercial uses of asbestos are readily available, regulation at the source to prevent further contamination of the environment is the most effective and least costly regulatory strategy.

OMB, however, refused to approve either of these proposals because of the costs they would impose on the asbestos industry. EPA was directed instead to refer asbestos risks to the Occupational Health and Safety Administration (OSHA) and the Consumer Product Safety Commission (CPSC) for regulation even though EPA previously had determined that such referral was not legally warranted. On February 1, 1985, EPA announced that it would go ahead with the referrals sought by OMB. EPA reversed this decision following the announcement of a congressional investigation that revealed that OMB had been dictating to EPA how to interpret its legal responsibilities under TSCA and had been maintaining that it was not worthwhile to prevent deaths due to asbestos-related diseases given their long latency periods. See Report of Subcomm. on Oversight & Investigations of the House Energy & Commerce Committee, EPA's Asbestos Regulations, 99th Cong., 1st Sess. (Oct. 1985).

Although EPA has now gone ahead with the proposed regulations, OMB has succeeded in delaying just the proposal of the regulations for nearly two years. OMB review still may block or delay adoption of the final regulations. A full-scale congressional investigation should not be required in order for the regulatory process to operate properly.

C. OMB Is More Concerned with Reducing Costs to Industry than with Maximizing Net Benefits to Society.

Even though Executive Order 12291 specifies that "[r]egulatory objectives shall be chosen to maximize the net benefits to society." Executive Order 12291, Sec. 2(c), this is not the primary principle OMB pursues in regulatory review. Though it seeks to preserve the fiction that its decisions are based on neutral cost-benefit principles, OMB makes little secret of its anti-regulatory bias. OMB uses cost-benefit principles in a decidedly asymmetric fashion: major regulations cannot be promulgated without extensive cost-benefit analysis, but they can be repealed without any such analysis at all. Thus, OMB required no regulatory impact analysis for EPA's *revocation* of the national ambient air quality standard for hydrocarbons, 48 Fed. Reg. 628 (1983), although such an analysis was required when EPA considered *tightening* the ambient air quality standard for particulates. See Olson, *supra*, at 54. When the analysis showed that an even tighter standard for particulates would maximize net benefits, OMB attacked the study and told EPA to do it over again. *Id.*, at 72-73.

The experience with EPA's lead phasedown regulations shows that OMB is more concerned with saving industry money than with maximizing net benefits to society. In February, 1982, EPA, acting on instructions from OMB and the Presidential Task Force on Regulatory Relief, proposed to repeal all limits on the lead content of gasoline. Because repeal of this regulation was designed to save the refining industry money, OMB did not require EPA to perform a regulatory impact analysis. 47 Fed. Reg. 4812 (Feb. 22, 1982). Thus no consideration was given to whether repeal of the lead regulations would reduce net benefits to society. However, two years later, after the move to repeal the lead limits had failed and EPA considered strengthening the lead regulations, OMB required a regulatory impact analysis. This analysis demonstrated that the lead limits produced overwhelming net benefits and that tightening of the regulation would yield even greater net benefits of more than $1 billion per year in reduced expenses for medical care, vehicle maintenance and misfueling. EPA, Costs and Benefits of Reducing Lead in Gasoline, March, 1984. Yet OMB would have been content to repeal this regulation without any cost-benefit analysis at all, sacrificing billions in net benefits simply to reduce slightly the costs borne by the refining industry. Although OMB ultimately permitted EPA to tighten the lead limits, it vetoed EPA's efforts to consider a ban on leaded gasoline.

Regardless of one's views of the desirability of presidential oversight to coordinate regulatory actions by executive agencies, OMB has performed that role so poorly and in such a biased fashion as to discredit the existing regulatory review mechanism.

D. OMB Acts in Secrecy, Undermining Public Confidence in the Regulatory Process and Destroying Accountability.

OMB has been able to exceed its authority with impunity only because it operates in complete secrecy. OMB zealously tries to prevent any of its influence on regulatory actions from ever appearing in the public record. There is nothing in the public record of EPA's rulemaking that reflects OMB's review of the proposed permitting standards for hazardous waste in tanks. Although EPA's Federal Register notices routinely state that comments received from OMB during its review of draft regulations and EPA's responses to them are available in the rulemaking dockets, the dockets rarely if ever contain such information. See Olson, supra, at 58-60.

It is clear that OMB staff sought to conceal their role in dictating changes to EPA in the proposed tanks standards. The original draft notice of proposed rulemaking for the tank standards that was submitted to OMB included a statement that OMB's comments and EPA's responses to the proposed regulations would be in the public docket. This statement, however, was eliminated from the proposed regulations following OMB review and it was not contained in the version published in the *Federal Register* after EDF filed its lawsuit. OMB documents obtained by EDF in connection with the lawsuit indicate that OMB staff did not want OMB's changes in the proposed rule to be transmitted to EPA in writing because they feared that EDF would file a lawsuit. See EDF December 2, 1985 Memorandum in *EDF* v. *Thomas*, at 12 n.11; Exhibit SA-10 in *EDF* v. *Thomas*, No. 85-1747.

After EDF filed its lawsuit, OMB did everything possible to resist discovery by EDF in order to avoid disclosing the role it played in altering the proposed standards. OMB sought to have the court bar EDF from conducting any discovery. After this motion was denied, OMB refused to produce any of the documents that reflect its role in altering the tank standards and claimed that they were protected by executive privilege. When EDF deposed the former director of EPA's Office of Solid Waste he was instructed not to answer any questions about OMB's role in review of the permitting standards.

The court subsequently ruled that it was unnecessary to decide the executive privilege issue because the documents could be provided to EDF under seal for use in the litigation without being disclosed to the public. However, OMB then sought to suppress the contents of EDF's brief in its entirety because it discussed the general nature of OMB's actions even though it did not reveal the contents of the documents. The court rejected OMB's motion as "extraordinary and unwarranted" and noted that the litigation could not be conducted in open court if OMB's broad claims of privilege were upheld. Even before OMB learned of the court's rejection of its attempt to suppress

EDF's brief, OMB filed its own response brief discussing its version of the facts. However, it did not place this brief under seal. Thus, OMB apparently wanted its version of the facts to be available to the public, but not EDF's.

This litigation demonstrates how difficult it is to obtain information about what OMB does behind closed doors to dictate regulatory decisions by EPA. In the absence of such information, it is virtually impossible to hold OMB accountable for its actions, even if they clearly exceed the limits of OMB's authority. EDF has been successful in obtaining such information with respect to the tank standards only because of unique circumstances. However, OMB will continue to do everything possible to conceal its actions in the future.

III. OMB MUST BE PROHIBITED FROM EXCEEDING THE LIMITS OF ITS AUTHORITY.

In order for public confidence and accountability to be restored to the regulatory process, it is essential that OMB be required to confine its regulatory review to proper limits. The source of OMB's ability to exceed the "advisory and consultative" role contemplated by the executive orders is its ability to block publication of regulations for indefinite periods of time. If EDF prevails in its litigation, OMB no longer will be able to block publication of regulations beyond the date of statutory deadlines. While this will be a major improvement, it will not stop OMB from indefinitely blocking regulations that are not subject to deadlines. Thus, there is a great deal that Congress can do to stop OMB's abuses of power. If EDF is not successful in its litigation, there will be an even greater need for legislation to rectify OMB's abuses of power.

A. OMB Should Be Required to Submit Written Summaries of its Comments for Inclusion in the Public Rulemaking Record.

Because OMB plays a major role in regulatory decisionmaking, it is important to the integrity of the regulatory process that OMB's comments be available for public review. This is the only way to ensure that regulatory decisions are not based on factors that are impermissible under the underlying regulatory statutes. A requirement that all written comments from OMB be included in the public record would not be sufficient to ensure public disclosure of OMB's role. In order to prevent public disclosure of its role, OMB seeks to avoid putting anything in writing that reflects its position during regulatory review. Thus it is essential that OMB and EPA be required to prepare written summaries of the nature of OMB's comments during regulatory review and that these summaries be included in the public record. Similarly, any written materials transmitted between OMB and EPA during regulatory review also should be included in the public record.

It is also important to place in the public record the nature of any changes made in regulatory proposals during OMB review. This can be accomplished by requiring that drafts of proposed regulations that are submitted to OMB be included in the public record, with an explanation of the reasons why significant changes in the proposals were made. Congress also should require that the list of proposed regulatory actions submitted annually to OMB pursuant to Executive Order 12498 be published at the time of submission to OMB in order to permit disclosure of any actions vetoed by OMB.

While OMB is likely to argue that public disclosure of its comments will "chill" the free flow of information essential to the deliberative process, because these comments would be disclosed in the public record only after the proposed regulations are published, the only chilling effect public disclosure would have would be to deter OMB from making improper recommendations.

B. OMB Should Not Be Permitted to Block EPA's Publication of Regulations Beyond Statutory or Judicial Deadlines.

It should be unnecessary for Congress to specify with any more clarity that OMB has no authority to block publication of regulations beyond statutory deadlines because this already is the law. This point will be even clearer if EDF prevails in EDF v. Thomas. However, if any legislation is adopted that deals with OMB regulatory review, it is important that Congress not permit OMB to block publication of regulations beyond statutory deadlines.

Although OMB argues that it is unfair to deprive it of an opportunity to review and comment on regulations after EPA has missed a deadline, a clear alternative procedure exists that OMB has simply refused to follow. When a deadline has been missed, EPA should publish proposed regulations prior to, or simultaneous with, submission to OMB. OMB would remain free to comment on regulatory proposals during the normal course of EPA rulemaking. But OMB should not be permitted to delay publication of regulatory proposals after a deadline has passed.

C. Strict Time Limits Should Be Placed on OMB Review.

For regulations not subject to statutory or judicial deadlines, there currently is no limit on OMB's ability to delay publication. OMB should not be permitted to block regulatory action indefinitely in order to dictate substantive changes in regulations. If OMB's review is truly to be "advisory and consultative" and not to displace agency decisionmaking, then OMB should not be permitted to extend review beyond the time necessary for it to formulate its position and communicate it to the agency. The ultimate regulatory decisions must then be left for the agency to decide.

Congress could take a major step toward reducing OMB's abuses of the regulatory review process by placing strict time limits on OMB review that would apply even when regulations are not subject to statutory or judicial deadlines. It should not take OMB longer than one or two months to formulate its views and to communicate them to the agency. If OMB wishes to comment on regulatory proposals beyond this period, OMB is free to participate in the rulemaking process during the public comment period.

D. Congress Should Clarify that OMB's Actions Are Reviewable in Litigation Enforcing the Limits on OMB's Authority.

In EDF v. Thomas, OMB has claimed that even if it has exceeded its authority by blocking regulatory action beyond statutory deadlines, the court is powerless to remedy this abuse of authority. OMB argues that the court has no jurisdiction over it. Although EDF believes this claim is without legal merit, if the court should uphold OMB's argument, it would be important for Congress to close this loophole. It should be made clear that OMB's actions to block publication of regulatory proposals by extending review beyond a statutory deadline constitute final agency action for purposes of the Administrative Procedure Act. In addition, if Congress establishes time limits on OMB review for regulations not subject to deadlines, Congress should also establish a cause of action for enforcing these time limits. Where a statutory deadline has been violated, as in EDF v. Thomas, a statutory cause of action to enforce the deadline already exists under the statute establishing a deadline.

Any legislative action to remedy OMB's abuses of the regulatory review process must establish a clear mechanism for enforcement to ensure that OMB observes the limits of its authority. Clear limits on OMB's authority already exist, but the executive orders are structured in a way to make it extremely difficult to discover unauthorized OMB action and to take action to redress it.

IV. CONCLUSION

Regardless of one's views on the wisdom of OMB review of regulatory action, it is clear that OMB has abused its powers of regulatory review and exceeded the limits of its authority. In order to increase the integrity of the regulatory process and to restore public confidence and accountability, OMB must be required to adhere to the proper limits on its authority.

Senator GORE. Thank you, Mr. Chairman.

Senator DURENBERGER. I welcome the ranking member of our subcommittee, our good friend from Florida, Senator Chiles. Do you have any questions of this panel, or would you like to use this as an occasion to make an opening statement?

Senator CHILES. I have an opening statement, but I understand that you have reserved yours.

Senator DURENBERGER. I do not want to take any more time with questions here. Again, we have some more questions to submit.

Thank you both very much. I appreciate your being here as we all do, and I am grateful to you for your testimony.

The next witnesses today are the Director of the Office of Management and Budget, Mr. James C. Miller III, and the Administrator of the Office of Information and Regulatory Affairs, Wendy Gramm.

OPENING STATEMENT OF SENATOR DURENBERGER

Senator DURENBERGER. Dr. Miller, as you all know, has a distinguished record in the field of economics and regulatory policy. He served as Chairman of the FTC, Executive Director of the Presidential Task Force on Regulatory Relief. I think that I will put all the rest in the record. The Director does not need the weight of my testimony as to his credentials.

Dr. Gramm is the current Administrator of the Office of Information and Regulatory Affairs. Prior to that, she was the Director of the Federal Trade Commission's Bureau of Economics. She is the author of numerous scholarly articles. She holds a Ph.D. in economics from Northwestern.

We are grateful that both of you are here today. Let me begin by saying that with this hearing, the subcommittee, which Lawton Chiles and I are managing this year, begins to exercise its new oversight responsibilities with respect to the regulatory review activities of the Office of Management and Budget under Executive Orders 12291 and 12498. Together, these two orders give the President of the United States an unprecedented opportunity to improve the efficiency and the effectiveness of Federal regulation, and who could be opposed to that? Not me, certainly. In fact, if that were all that this OMB process were used for, none of us would be sitting here this morning.

Rulemaking should be victimless. When Carl Levin and I first got here in 1979, the problem was regulatory overkill. Businesses were failing under the burden of agency policymaking through regulation. People were losing their jobs. Now, we have gone overboard the other way. Today, it is under-regulation, and people are losing their lives—as we heard earlier this morning, people are losing their lives.

Almost from the beginning, OIRA made it clear that the process would be used to make agency regulatory activities conform to administration regulatory policy. As a practical matter, that policy has been to promote less regulation.

In some cases—such as trucking and airlines—that is the right thing to do. In others—which we will be hearing about this morning—it is not.

Today, we are witnessing some examples of what happens when regulatory review does, indeed, turn into regulatory neglect. Each case that have heard about has taken a human toll. In one case, that of toxic dumps, the problem ends up in the courts. In another—asbestos—a stalemate; the rules languish in the now infamous "black hole" at OMB. In the case of grain dust and grain elevators, it ends up in tragedy like the incidents we have heard about today.

Jim, I know how busy you have been this morning. We picked a great day to have you here. But we started today's hearing with a 10-minute series of new tapes on a variety of some of these tragic explosions that have taken lives across the country.

OMB continues to keep its oversight role secret, one-sided, and, under the current process, OMB seems to be able to delay proposed rules for any length of time. It can interfere with statutory deadlines for regulation. It can serve as a secret conduit for industry opposition to rules, and it can impose its own limited interpretation of cost/benefit analysis to the exclusion of other relevant considerations. In fact, it appears from the testimony and research before this committee that OMB has done all of these things.

I support improving regulatory administration. I support OMB acting as the voice of efficiency and coordination because we need that kind of watchdog in the implementation of congressional policy.

Less regulation is not the answer to the problem of the environment, civil rights, consumer protection, and workplace safety. The answer is better regulation. More rational regulation. These are areas in which economic efficiency was never or primary objective. Rather, we regulate to save lives and to safeguard the freedoms and resources we have for ourselves and the generations that will follow. You cannot effectively regulate in these areas simply by crunching numbers in a computer because the costs and benefits are not that easy to quantify, nor should they be.

OMB does have a role to play in controlling the skyrocketing costs of regulation through administrative reforms, but I believe that it should not be the only role or even the dominant role. That is the reason why I joined yesterday with Senator Levin and introduced the Rulemaking Information Act of 1986.

It would open the rulemaking process to scrutiny and add accountability for policy changes and delays in action. It doesn't solve all the problems, but it is a down payment on a longer term strategy for rational regulation.

We are here today to look for answers to the problem. I, for one, am encouraged about the future of the process because Jim Miller is back at OMB heading it. I also want to compliment you, Jim, on your choice for Administrator of the Office of Information and Regulatory Affairs, Wendy Gramm.

Last September, when you and I began to discuss the problems which developed in OMB's review process during your absence, I was encouraged by your expression of support for opening this process up in a way that gets the views of Congress and the public heard while the rule is still under discussion. I was encouraged by your comments that the process will be strengthened, and its image improved by "letting the sunshine in."

I look foward to hearing more about your plans to do that today. [Prepared statement of Senator Durenberger follows:]

PREPARED STATEMENT OF SENATOR DURENBERGER

With today's hearing, this subcommittee begins to exercise its new oversight responsibilities with respect to the regulatory review activities of the Office of Management and Budget under Executive Orders 12291 and 12498.

Taken together, these two orders give the President an unprecedented opportunity to improve the efficiency and effectiveness of federal regulation. And who could be opposed to that? Not me, certainly. In fact, if that were all that this OMB process were used for, none of us would be sitting here this morning.

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Almost from the beginning, OIRA made it clear that the process would be used to make agency regulatory activities conform to Administration regulatory policy. As a practical matter, that policy has been to promote less regulation.

In some cases—such as trucking and airlines—that is the right thing to do. In others—which we are hearing about this morning—it is not.

Today, we are witnessing some examples of what happens when regulatory review does, indeed, turn into regulatory neglect. Each case has taken a human toll. In one case—that of toxic dumps—the problem ends up in the courts. In another—asbestos—it ends in stalemate—the rules languish in the now infamous "black hole" at OMB. And in the case of grain dust in grain elevators, it ends in tragedy, like the incident a few months ago in Marion, South Dakota, where a 100-foot concrete silo exploded, killing three men. Twelve explosions in the past three months, five deaths, a dozen critical injuries. Jim, I wish you'd been here to see the newstape of some of those tragic explosions.

In addition, OMB continues to keep its oversight role both secret and one-sided. Under the current process, OMB can delay proposed rules for any length of time, it can interfere with statutory deadlines for regulations, it can serve as a secret conduit for industry opposition to rules, and it can impose its own limited interpretation of cost-benefit analysis to the exclusion of other relevant considerations. And, in fact, OMB has done all of these things.

I support improving regulatory administration. I support OMB acting as the voice of efficiency and coordination. We need that kind of watchdog.

Less regulation is not the answer to the problems of the environment, civil rights, consumer protection, and workplace safety. The answer is better regulation. More rational regulation. These are areas in which economic efficiency was never our primary objective. Rather, we regulate to save lives and to safeguard the freedoms and resources we have for ourselves and the generations that will follow. You cannot effectively regulate in these areas simply by crunching numbers in a computer, because the costs and benefits are not that easy to quantify. Or, they shouldn't be.

OMB does have a role to play in controlling the skyrocketing costs of regulations through administrative reforms. But I believe it should not be the only role or even the dominant role.

That's the reason I am joining Carl Levin to introduce the Rule Making Information Act of 1986. It would open the rulemaking process to public scrutiny, and add accountability for policy changes and delays in action. It doesn't solve all the problems, but it's a down payment on a longer term strategy for rational regulation.

We are here today to look for answers to this problem. I, for one, am encouraged about the future of the process because Jim Miller is back at OMB heading it. I also want to compliment you, Jim, on your choice for Administrator of the Office of Information and Regulatory Affairs, Wendy Gramm.

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I look forward to hearing more about your plans to do that today.

Senator DURENBERGER. Lawton, do you have a comment that you would like to make at this time?

Senator CHILES. I do, Mr. Chairman.

OPENING STATEMENT OF SENATOR CHILES

Senator CHILES. I want to applaud your initiative in holding this oversight hearing on the Office of Management and Budget regulatory review role. The Subcommittee on Intergovernmental Relations has been in existence since the 1960's. This is the first Congress that has had oversight responsibility for OMB's Office of Information and Regulatory Affairs.

I know that effective oversight is one of the most difficult, tedious and yet important tasks Members of Congress do. I certainly want to encourage you to hold more hearings on this subject, as well as the other information policy roles Congress has assigned to OMB in the Paperwork Reduction Act. Your interest and leadership in this area is certainly vital.

I want to welcome Director Miller and Wendy Gramm. I recall our initial visit, Mr. Miller, back in 1981, when you were first appointed Administrator of the Paperwork Shop. I think I suggested two things: Remember who you meet from Congress on your courtesy visits, you are going to need their help by the time Congress is finished with you; and be sure that your deputy is a tough character because you are going to want somebody to share the heat. Making the head of the office a lightning rod was exactly what Congress intended. We wanted to pinpoint accountability. I suspect Mrs. Gramm will have a sense of that by the time this hearing is over.

We welcome you, Mrs. Gramm, to the kitchen of oversight.

Mr. Chairman, I understand that your focus this morning is on the OMB regulatory role. I share your concern the role needs more sunshine cast upon it. Senator Levin has taken the lead in the past three Congresses. I have certainly supported him.

I share as well the concern that the OMB role not be used to improperly delay rulemaking. We created a solution to that in the Paperwork Act by requiring a 90-day limit on the Director. There are differences with the Executive orders on regulatory review, but I would advocate that the President insist on a similar deadline for the role delegated to the Director. Among other things, that would eliminate a major weapon agency officials use with their authorizing committee chairmen in the turf wars with OMB.

I also agree that the regulatory review is not some abstract process that only interest groups in Washington care about. The results of what goes on are basic to how Government is perceived and experienced by the public. The public perception of Government regulation has changed since the early 1970's when I came here. There has been a pendulum effect to public attitudes.

But I am also impressed by how some issues remain similar through time.

Mr. Chairman, I have a little historical perspective here that I would like to present in the record in the interest of trying to make my statement shorter. I think that we did attempt to make some changes. After 4 years of experience with the Paperwork Act, this committee reported a set of amendments which further strenghtned accountability to the Congress and enabled more public participation in the decisions made by the agencies and OMB. that bill had Senator Danforth, Senator Levin, yours and my support. We concluded that there were pluses and minuses to the OMB role. We moved to eliminate the minuses. Senator Levin's disclosure amendments were included.

The administration and, to my understanding, House critics of OMB were supportive. We had worked out an amendment that met the concerns of representatives of organized labor. In short, that bill would have met many of the needs we are going to talk about today. But that bill was killed in an act of bad faith by interest groups who fundamentally distrust the idea that OMB should be permitted to coordinate and review agency actions. Behind closed doors, they persuaded Members of the Senate to block consideration of the bill.

I certainly want to work with you, Mr. Chairman, in clarifying what the OMB's role should be and how it should operate. I hope that we can talk Director Miller into taking some steps that he can make without legislation which would contribute to more public participation and confidence.

This is an important issue that does affect people. I am mindful, however, that there are some traditional opponents to passing any law which touches upon the OMB role in managing regulations. There has to be some modicum of trust if we are going to write a bill that any President would sign.

Thank you, Mr. Chairman, I ask that the statement I included in the committee's report of the 1984 Paperwork Amendments be included in the record of this hearing.[1]

Senator **Durenberger**. Without objection, so ordered.

[Prepared statement of Senator Chiles follows:]

PREPARED STATEMENT OF SENATOR CHILES

Mr. Chairman, I want to applaud your initiative to hold this oversight hearing on the Office of Management and Budget's regulatory review role.

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[1] See p. 341.

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I also agree that regulatory review is not some abstract process that only interest groups in Washington care about. The results of what goes on are basic to how government is perceived and experienced by the public.

The public perception of Government regulation has changed since the early 1970's when I first came here.

There is a pendulum effect to public attitudes.

But I am also impressed by how some of the issues remain similar through time.

Let me make a few quick observations.

In the mid-seventies this committee undertook a major five year study on the regulatory process. Senator Ribicoff's sponsorship resulted in six volumes of detailed work and the first of several regulatory reform bills whose purpose was to resolve rulemaking problems we concluded Federal agencies were having by proposing amendments to the Administrative Procedures Act.

Most of the committee chairmen supported those bills until we began to consider what the President's management role in coordinating agency rulemaking should be. I believe the committee's initial response was to beef-up the activities of the Administrative Conference.

The idea of OMB operating in behalf of the President and focusing accountability for the President and Congress was a major stumbing block. The administrative Procedures Act was originally framed as a restraint against strong executive authority and that tradition prevailed. Senator Ribicoff and later Senator Laxalt did not see their bills become law.

This committee also passed the law creating the Paperwork Commission at the same time we undertook the regulatory study. That effort built upon the experience with the 1942 Reports Act. There the tradition was strong central management. We built on that model in passing the Paperwork Reduction Act in 1980. It was intended as a regulatory Reform Measure with strong accountability controls to the public and the Congress.

We were fully aware that the APA and the Reports Act had existed side by side for over thirty years. Several provisions in the law, specifically the override provisions for independent regulatory commissions, were intended to accommodate that relationship.

We also incorporated into the law the practice which had developed in the Carter administration of integrating paperwork clearances with review of how agencies were conforming to the President's Executive order on improving regulations.

Recall the then Director of OMB use to issue report cards on the Cabinet Secretaries and give them to the President at Cabinet meetings.

Then Comptroller General Staats was instrumental in persuading Congress to link management of information policy with reviewing regulations.

As you know, after four years of experience with the Paperwork Act, this committee reported a set of amendments which further strengthened accountability to the Congress, and enabled more public participation in the decisions made by the agencies and OMB.

That bill had Senator Danforth's, Senator Levin's, your and my support.

We had concluded there were both pluses and minuses to the OMB role and we moved to eliminate the minuses. Senator Levin's disclosure amendment was included. The administration, and to my understanding, House critics of OMB were supportive. We had worked out an amendment that met the concerns of representatives of organized labor.

In short, that bill would have met many of the needs we are going to talk about today.

But that bill was killed. It was killed in an act of bad faith by interest groups who fundamentally distrust the idea that OMB should be permitted to coordinate and review agency actions. Behind closed doors, they persuaded Members of the Senate to block floor consideration of the bill.

I want to work with you Mr. Chairman in clarifying what the OMB role should be and how it should operate.

I hope we can talk Director Miller into taking some steps he can make without legislation which would contribute to more public participation and confidence.

This is an important issue that does affect people. I am mindful however, that there are some traditional opponents to passing any laws which touch upon the

OMB role in managing regulations. There has to be some modicum of trust if we are going to write a bill any President would sign.

Thank you Mr. Chairman, I ask that a statement I included in this committee's report on the 1984 paperwork amendments be included in the record for this hearing.

Senator **Durenberger**. Dr. Miller, your full statement will be made part of the record, and you may proceed. Take as much time as you need. Do we still have a time problem?

Mr. **Miller**. No, Mr. Chairman.

TESTIMONY OF JAMES C. MILLER III, PH.D., DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY WENDY GRAMM, PH.D., ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS

Mr. **Miller**. Mr. Chairman, I want to thank you for the committee's indulgence. As you know, this morning, I had to make a presentation to the President.

Senator **Durenberger**. You may proceed with a summary of your statement, or approach the issue in any way you like. I am going to suggest to my colleagues that we try to limit our questions to 5 minutes each, but we will keep going around as long as people have questions, or Jim is willing to stay here.

Mr. **Miller**. Mr. Chairman, and members of the committee, I would like to preface my statement with a couple of observations. First, as I indicated during my confirmation hearing, I do agree with the notion of as much openness as possible to the extent this is consistent with the process of deliberative discussion among agency officials.

Second, I am inclined to make certain modifications in the procedures followed by the Office of Information and Regulatory Affairs, but I will not be making any commitments concerning those today. I, too, want to review what has been said here today, and the papers that will be part of the record, before coming to any strong conclusions.

Third, the starting point for our collectively considering this matter has to be on a factually accurate record. This morning, I hope to put that record into clearer perspective.

As you know, I was the first Administrator of the Office of Information and Regulatory Affairs, from January 1981 until October 1981, I then became Chairman of the Federal Trade Commission. The Office, or OIRA, is responsible for regulatory review, but it has other functions as well. These include information policy, statistical policy, and paperwork reduction. I have outlined these efforts in the written testimony.

Our report of September 1985 on managing Federal Information Resources describes these other activities in greater detail, and it also points out how OIRA's oversight of Federal Information Resources supports our regulatory oversight. In many situations, in fact, our regulatory activities are inseparable from our other activities. This is most apparent in our paperwork clearances.

More than one-half of the total paperwork burden imposed by departments and agencies is set forth in agency regulations, or otherwise mandated by law. That amounts to about 1 billion hours of human effort every year, 500,000 productive work-years.

To reduce the paperwork burden required by statute, we must necessarily cut the burden imposed by regulations. In the Paperwork Reduction Act of 1980, Congress understood this relationship and clearly required that the burden imposed by regulations be approved or disapproved by OMB, and provided, through the Kennedy amendment, for the coordination of our paperwork reviews with agency rulemaking procedures.

My point is that the responsibilities of the Office of Information and Regulatory Affairs interrelate, and necessarily so. Today, regulatory business is paperwork business, and vice versa. Today, regulatory business is also statistical business, and paperwork is quite clearly information policy. We coordinate these oversight responsibilities to support one another, and to coordinate the related activities of the departments and agencies.

In October 1977, the Commission on Federal Paperwork found that the Federal paperwork burden was, quite frankly, a mess. Recommendations of the Commission led to revisions of the Federal Reports Act of 1942, revisions that became the Paperwork Reduction Act of 1980.

During the past 10 years, this committee in particular has studied and supported legislative proposals to improve the Federal regulatory and information collection systems. This committee found that regulatory agencies, individually and collectively, did not appreciate the impact, or the burden, of what they were doing. This is the implicit premise of many of the detailed conclusions contained in the seminal, six-volume Study on Federal Regulation issued by this committee in 1977 and 1978.

Moreover, over the period 1976 through 1979, members of this committee and the Judiciary Committee in the Senate concluded that a major cause for regulatory disarray was that regulatory agencies were not accountable for what they were doing. The Federal establishment, they said, had become less accountable to the public.

Members were not at a loss for solutions to this regulatory disarray, often pointing to the need for better management of agency regulatory activities. A report issued by the House Subcommittee on Oversight and Investigations of the Commerce Committee during 1976 pointed out that the effectiveness of regulation can be increased significantly by reducing and eliminating duplicative and anticompetitive and ineffective programs. In 1979, Senator Roth suggested that the regulatory system is desperately in need of a mechanism for balancing the demands of competing and conflicting regulatory agencies and programs.

As Congress and the exective branch began work on legislation to address these problems, usually proposals to amend the Administrative Procedure Act of 1946, Presidents Nixon, Ford, and Carter each took action as Chief Executives to address the problem. Each initiated a formal regulatory review program. Each increasingly centralized these reviews within the Executive Office of the President.

President Nixon established in the Executive Office of the President, a "quality of life" review of certain regulations. President Ford issued Executive Order 11821 to require agencies to prepare, and OMB to review, inflation impact statements—the precursors of our regulatory impact analysis. President Carter issued Executive Order 12044 requiring detailed analyses of agency regulatory actions and review by the Executive Office of the President.

President Reagan was very concerned about the regulatory burden, and the regulatory process. During his campaign in 1980, the President outlined to the American people what would become his program of economic recovery. Shortly after taking office, he put that program into effect. One of its four major components was the commitment to relieve the economy of the excess regulatory burdens that had been piled by Federal departments and agencies upon virtually every facet of our economy, our society, and our very lives depended.

In the early days of this administration, the President moved quickly to deliver on that promise. He established a Presidential Task Force on Regulatory Relief, chaired by the Vice President, to oversee the implementation of this facet of his program. His first task was to spearhead the review and reform of some regulations that were already in place, whose burdens, many believed, exceeded their associated benefits.

The President then signed Executive Order 12291 in February 1981. This order set forth clearly the President's regulatory principles. The President asked his appointees, the heads of departments and agencies, to follow these principles in making their regulatory decisions to the extent that they could do so under the law that governed their decisions.

He required that the decisions be based on adequate information concerning the need or consequences of proposed regulations. He directed that regulatory action should not be undertaken unless the benefits of the action would outweigh the costs. He instructed that the regulatory option be chosen that maximizes net benefits to society. He directed that his appointees select the regulatory alternative--again within the constraints established by existing law that involves the least net costs to society, with the aim of maximizing aggregate net benefits to society.

The President also instructed the Director of the Office of Management and Budget to review the draft proposed and draft final rules of departments and agencies to ensure that these regulatory principles were being properly applied. The Director's review authority has been delegated to the Administrator for Office of Information and Regulatory Affairs. Since 1981, the Office has reviewed over 12,000 such drafts and has advised the heads of departments and agencies on whether these drafts are consistent with the President's regulatory principles.

Over this period of time, approximately 80 percent of all such drafts have been found to be consistent with the President's regulatory principles without need for any change. For nearly 20 percent of the drafts, the Office concluded, following changes to the drafts made by the agency head, that they were consistent with the President's principles. For a little over 1 percent of these drafts, the Office advised the agency head that the proposal was not consistent with the President's regulatory principles. The average length of review of these 12,000 draft rules has been 16 days.

It became obvious, however, that much more could and should be done. Despite Executive Order 12291, and despite the mamouth expenditures that Federal regulations extracted from some and the benefits they gave to others, Federal regulations were still being managed far less systematically than direct Government spending. Executive Order 12291 reviews often came late in the regulatory process, after huge investments of agency time and resources.

On January 4, 1985, President Reagan decided to involve agency heads, policy officials, and the public earlier in the rulemaking process. I want to emphasize that. He decided to involve agency heads, policy officials, and the public earlier in the rulemaking process. He issued Executive Order 12498 in order to see that the laws were being faithfully executed, and that the policies of this administration were reflected in the regulations issued under those laws.

Under Executive Order 12498, certain executive departments and agencies are required to prepare regulatory overview statements and descriptions of their significant regulatory actions—the ones that they are planning or conducting—and submit a plan to OMB.

Then OMB performs a policy review on behalf of the President in a manner similar to the budget process. President Reagan specifically directed OMB to review each agency's draft regulatory program for consistency with the administration's regulatory policies and priorities, and with the draft program submitted by other agencies. The President also directed OMB to identify further regulatory and deregulatory actions as would be necessary in order to achieve such consistency. Issues raised but not resolved by OMB and the agency were to be referred to the appropriate forum and, when necessary, to the President.

Following this Executive review, the agency statements of regulatory policies and significant regulatory actions were to be compiled and published in the administration's regulatory program. Once the regulatory program was published, President Reagan authorized OMB to return for reconsideration any significant rule received under Executive Order 12291 if it was not, but should have been included in, or was inconsistent with, the published program. Special provisions were made for emergency rules, and those required by judicial or statutory deadlines.

The regulatory review program initiated under this Executive order was designed to improve the management of the Government's regulatory operations. As President Reagan stated in issuing the order, each agency head would become accountable for the management of the regulatory process, to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others.

Publication of the annual regulatory program by the executive office also permits Congress and the American people to understand more fully the executive's regulatory choices and its priorities—to understand more fully at an earlier stage how it intends to exercise the discretion that Congress has provided by statute. Sometimes, it can take some 2, to 5, to 8 years for an agency to develop a rule. With the publication of the regulatory program, the public will know sooner where the administration is planning to go—way before the publication of any proposed rule.

This program compliments Executive Order 12291, and has provided agency heads and the Chief Executive a better opportunity to decide whether the regulatory activity is worth initiating before committing agency resources to it. This earlier review also helps to avoid a delay, and avoids the need for first time executive analysis of basic regulatory strategy at the very beginning of the rulemaking process.

President Reagan released the first annual Regulatory Program in August 1985. He stated that the program presents for the first time a comprehensive program of regulatory policy to be carried out in the coming year. He further stated that all of this cannot be accomplished simply by publishing a book. This program is the end product of a long process of agencies planning their regulatory activities, gathering and reviewing information, evaluating past progress and program effectiveness, and setting goals and priorities. The publication of the Regulatory Program for 1985 is, however, only the first step in this annual planning process. The next step is for each agency to implement its part of the first program as planned and on schedule.

I think few today would question that Executive Order 12291 and the Paperwork Reduction Act of 1980, that was developed by and actively support by this committee, have been effective in both removing and reducting unnecessary burdens on our economy and our society as a whole, and also in improving the effectiveness of thos requirements that were imposed.

While I believe the regulatory review process is working well, concerns have been expressed: No. 1, that OMB exercises improper influence over agency regulation; No. 2, that we have inappropriate contacts with outsiders; and No. 3, that our review times are too long. I would like to respond to each of the allegations.

With respect to the allegation of improper influence, it is important to remember that OMB serves as advisor and consultant to the President with respect to agency development of regulations. OMB does not supplant the legal authority of the rulemaking agency. All legal authority for issuing regulations is vested in the agency or department.

However, as I detail in my written statement, and as I have just described, there is a long history of executive oversight of the regulatory process. In essence, the Executive order simply systematized and made more formal, and therefore made more public and visible, the long standing informal practice by which executive branch agencies sought prior Whilte House advice on important and politically sensitive regulations, Past administrations and Congresses have endorsed such oversight.

Future Presidents, as Chief Executives accountable to the public, will undoubtedly continue to review and to oversee agency regulations. In such review, OMB is carrying out the delegated constitution authority of the President, carrying out his reponsibility as manager and chief executive of the departments.

However, we have supported and continue to support legislation that would explicitly authority review of regulations by the Executive Office of the President. As you know, we worked with this committee and with the Senate Judiciary Committee on S. 1080, the Laxalt-Leahy Regulatory Reform Act of 1982. I was involved in that before I left OMB. We worked with this committee in the 98th Congress on S. 2433, a bill that would have provided authorization for appropriations for the Office of Information and Regulatory Affairs for fiscal year beginning in 1984. Although the bill was supported by the administration and unanimously reported by this committee, it was not enacted.

Included in these bills was the Levin-Rudman amendment which required that when our review of an agency's proposed or final rule was completed, we would, upon request, make available all written communications concerning the rule that was sent to OIRA by the agency head. I would also have required that any written material sent by OIRA to the agency concerning the rule be available upon request.

Some in the administration believe that these conditions of disclosure raised many serious and difficult problems concerning the appropriateness and constitutionality of any legislation that would require public disclosure of information requested by the President. However, I continue to support the amendment because it has always been joined with a clear provision for statutory authority for the Executive to oversee the development of agency rulemaking.

The second area of concern we have heard expressed is that there may be undue influence by outsiders. Let me first describe the careful procedures that currently are in place to prevent even the perception of inappropriate contact by outside persons.

We continually advise the public and anyone contacting us that anyone who wishes to provide us with information should provide it as well to the agency concerned. We also make all written information that we receive from persons outside of the Federal Government available to anyone who requests it. Anybody who wants to find out what people on the outside have given us only have to come down and ask for it.

Senator Durenberger. You do not have to go to the men's washroom? We had some testimony here and some evidence of some information that was passed in a men's washroom some place here in Washington.

Mr. Miller. Probably this poor individual was given wrong directions.

Senator Levin. Do you mean that it should have been the women's restroom?

Mr. Miller. No. We now have a public reading room at which the public can read the written information we receive from persons outside the Federal Government.

We also limit who can talk to persons who are not employed by the Federal Government. In OIRA, only the Administrator or the Deputy Administrator or those explicity authorized by them may meet with a person outside of the executive branch for the purpose of discussing a rule subject to Executive Order 12291.

In opinions approving the relevant Executive orders, the Department of Justice reviewed our procedures and concluded that they are, indeed, lawful. Not one rule, not one rule, in more than 12,000 that we have reviewed has every been overturned by a court because of our review procedure. Not one rule in over 12,000 has been successfully challenged in court because of our review procedures.

Mr. Durenberger. You are trying to be forceful on that point?

Mr. MILLER. Yes; I do realize that Executive orders and OIRA's role are before the courts in two cases—*Public Citizens* v. *Roland*, and *EDF* v. *EPA and OMB*. I say this, and I emphasize it, Mr. Chairman, because, in 1981, I heard allegations that all of this was unconstitutional, was unlawful, et cetera, but there has not, 5 years later, been a single successful challenge to the lawfulness of the Executive order or our review procedures, despite our having conducted reviews of 12,000 rules.

Even though we believe our procedures are thoroughly lawful and appropriate, we continue to refine them. In April 1985, we developed some new procedures with officials of the Environmental Protection Agency, and instituted them on a trial basis to see if they were workable and useful.

These procedures made certain changes concerning information we received about EPA rules subject to Executive Order 12291. They opened the process further. There were three basic elements to these trial procedures:

First, although we have always made available to the public letters and correspondence that we received from persons outside of the Federal Government pertaining to agency regulation, agencies have not routinely obtained these documents from us. There is, of course, no reason why an agency must obtain copies of these documents. If they are not already part of the agency "record," they cannot be considered by the agency in arriving at rulemaking decisions, or in seeking to establish a rational basis or other statutory basis for the particular rulemaking. Nevertheless, we have agreed to send copies of all such letters and correspondence over to EPA, generally within 5 days of receipt by OIRA. We have done this since April 1985.

Second, with regard to telephone calls, meetings or other communications with outsiders conducted by the Administrator or the Deputy Administrator of OIRA—they are the only two officials in OIRA that talk to outsiders about such matters—we have agreed to advise EPA's general counsel of any such communications, and to answer any questions he or she might have regarding them. Again, we have done this since April 1985.

Third, when either the Administrator or the Deputy Administrator of OIRA has scheduled meetings with persons outside of the Federal Government on regulations under review pursuant to Executive Order 12291, we agreed, as appropriate, that we would advise the EPA's general counsel and would invite officials designated by EPA to attend those meetings if they so desired. We have invited EPA officials to the majority of such meetings, and, in each case, they have attended.

It appears to me that these trial procedures have proven to be workable, although one might question how useful they have been.

The Administrator of EPA has been advised that we are prepared to make these procedures part of our normal practice in dealing with EPA.

The third area of public concern is the length of the Executive Order 12291 reviews. On occasion, we hear that these reviews take too long. We had a colloquy at my confirmation hearing about that; I said that I would look into it.

On occasion, They do take too long, but the number that do is pretty small, and usually there is a good reason for it. The statistics on our review time do not indicate, in my judgment, that there is a systematic problem. You may have a different idea, but let me try to give you some picture of what the statistics are.

Executive Order 12291 provides 10 days for OMB review of nonmajor rules. For major rules, the order affords 60 days of review for proposed rules, and 30 days for a final one. As I recollect, the Executive order says that if the agency has not heard back from OMB within those time limits, the agency can presume that OMB has completed its review. All of these review periods may be extended by notice from OIRA to the agency concerned.

From February 1981, when President Reagan signed Executive Order 12291, to December 31, 1985, the statistics for OIRA Executive Order 12291 reviews include the following:

OIRA reviewed a total of 331 "major" rules from all departments and agencies subject to the Executive order. Review of major notices of proposed rulemaking averaged about 43 days. Review of major final rules averaged 26 days. Both are within the 60 and 30 day limits permitted by the Executive order. Review of all major rules averaged 32 days.

OIRA also reviewed a total of 11,914 nonmajor rules under Executive Order 12291 in an average of 16 days. I will have to say, as I told you privately, Mr. Chairman, that that number may be a slight underestimate because, during the period when I was there, our software didn't accept two-digit numbers, so if something was held for 12 days, it entered the computer as 9 days. This was corrected in 1981.

Some 81 percent of all rules were reviewed in 10 days or less, and 90 percent were reviewed within 30 days. The quantity of rules reviewed annually has declined slightly—from 2,803 in 1981 to 2,211 in 1985. The percentage of all rules returned, withdrawn, or changed by the agency in order to assure consistency with the President's regulatory principles has increased each year—from 8.3 percent in 1981 to 29 percent in 1985.

The average review time has increased from 9 days in 1981, which again, as I indicated, probably is an underestimate, to 28 days in 1985.

With respect to our reviews of EPA regulations, since March 1981, when we began our computerized tracking system, we reviwed 1,947 EPA regulations. In 1981, OIRA reviewed 734 EPA regulations. In December 1981, we exempted EPA's State implementation plan, or SIP, approval rules from our review, and as a result we reviewed only 341 EPA rules in 1982, 268 in 1983, 303 in 1984, and 302 in 1985.

Our review time for the 1,947 EPA rules covered since March 1981 has averaged 20 days. Some 73 percent of all EPA rules were reviewed in 10 days or less, 86 percent were reviewed in 30 days or less, and 92 percent where reviewed in 60 days or less.

When we exempted the SIP plans, which were practically rubber stamped——

Senator **Durenberger**. That is the State implementation plan for the nonacronymic audience here?

Mr. MILLER. That is right. When we exempted those from our review, since those had been virtually rubber stamped, the average length of review time jumped up.

As with other agencies, the average review time has increased over time—from 10 days in 1981, to 19 days in 1982, 22 days in 1983, 31 days in 1984, and 35 days in 1985. On the average, 34 days have elapsed following our completion of review before the EPA has published a rule in the Federal Register. This is a very important statistic. It usually takes EPA over a month after we have concluded our review to have the rule published in the Federal Register.

During my confirmation hearing last September, Senator Gore gave us a list of over 150 EPA air program rules, providing for each the date of the statutory or judicial deadline, the date of submission to OMB, and the date of publication in the Federal Register. The list did not indicate when the OMB review was completed, only when the rule was published. Nor did the list indicate when we recorded receipt of the rule.

If the list were intended to show the length of our review for selected regulations, it failed to do so because it does not indicate the time period in which we had the rule for review. If the date we finished review added for each rule, it turns out that our average review time—this is very important—our average review time is less than the average time EPA took after OMB review to transmit the rule to the Federal Register.

Moreover, the information provided does not indicate that our reviews caused EPA to miss statutory or judicial deadlines.

Of the 100 rules that were subject to a statutory deadline some 81 percent of the proposed rules were submitted to OIRA by EPA after the statutory deadline for the final rule had passed. Moreover, EPA submitted these proposed rules an average of 570 days after the final rule deadline had passed.

Some 73 percent of the draft final rules were submitted to OIRA an average of 480 days after the statutory deadline had passed. EPA submitted the other 27 percent of the final rules to OMB on average, some 223 days before the deadline. We completed our review on those rules in an average of about 34 days. Our review for all the final rules subject to a statutory deadline averaged 52 days, and EPA took another 66 days on average to publish the rule after we completed our review.

Mr. Chairman, in only one single case was a final rule under review at OMB while a statutory deadline passed. In only 1 case, only 1 on the list of 100 subject to a statutory deadline, was that true.

What about those items on Senator Gore's list subject to judicial deadlines? There were about 50 such rules due to lawsuits brought against EPA.

In contrast to its record with regard to statutory deadlines, EPA submitted 93 percent of the rules subject to a judicial schedule before the deadline. These rules were submitted an average of 29 days before the judicial deadline, and we completed our review on average within 18 days.

In only one case was the rule submitted for our review before the judicial deadline for which our review was not completed until after the deadline. For only 1 on this list of 150 was there a rule sitting at OMB when a statutory deadline passed; for only 1 on the list of 150 was there a rule at OMB for review when the judicial deadline passed.

For that rule—"Radionuclides-three categories"—EPA submitted the rule just 2 days before the deadline. We completed our review in 10 days, and EPA published the rule 19 days after we completed our review.

EPA took an average of 16 days to publish these rules subject to a judicial deadline after our review was completed. As a result, EPA missed the judicial deadline in 69 percent of the cases even though our review, except in the case of Radionuclides, was already completed prior to the deadline.

We monitor closely both the rules under our review and the length of time we take to review them. We are concerned that they not take too long. On occasion, they do, but we try to limit those occasions. Overall, I think our record over the last 5 years has been quite good, as I said in my confirmation hearing. The number of protracted rulemakings has been few, especially in light of the large number of draft rules, over 12,000, and draft collections of information, over 20,000, that we have reviewed.

For EPA in particular, our reviews are not the cause of missed deadlines. Compared to the length of time it takes EPA to develop a rule, often several years, our review times are quite short. To reiterate, our reviews average fewer days than it takes the EPA to transmit them to the Federal Register after our review has been completed. Nevertheless, we will continue to monitor our review work very carefully, and we will also work with EPA and other agencies to speed up the process of having rules published in the Federal Register after we complete our reviews.

Mr. Chairman, before I close, I would like to say something about the subjects I understand have already been discussed here today, or will be discussed later. I understand that there are three panel discussions on issues related to the activities of this office.

Once such panel, I understand, include a litigant in a lawsuit brought against EPA and OMB. That lawsuit pertains to a rule proposed under the Hazardous and Solid Waste Amendments of 1984. The litigation is ongoing, so my comments about the matter will be limited. However, I do wish to make two points.

First, the proposed rule at issue was submitted for OMB's review after the March 1 statutory deadline for a final rule. The proposed rule was given to us after the deadline for the final rule, thus our review was not the cause of the delay. Second, as I understand it, the plaintiffs do not challenge our review procedures.

Another panel, as I understand it will discuss EPA's 1984 proposed rules that would have prohibited all uses of asbestos. As you know, these two draft proposed rules were withdrawn from our review by EPA in January 1985. EPA recently resubmitted a proposed rule that presented several solutions for TSCA regulation of asbestos. We completed our review of this proposal in mid-January, and EPA announced last week that it would be publishing the rule soon for public comment.

Again, I would like to make a few points. Why EPA withdrew the two rules was investigated by the House Energy and Commerce

Subcommittee on Oversight and Investigations, on which Senator Gore served when he was in the House. We cooperated fully with that subcommittee in its investigation.

Our communication with persons outside of the Federal Government concerning these rules was also a subject of the investigation by the subcommittee. In a letter, dated March 22, 1985, OMB Director David Stockman provided the House subcommittee with a list of all communications by OIRA with persons outside of the Federal Government pertaining to these draft proposed rules.

The list consisted of letters received by OIRA and a description of three meetings. The two meetings with the Canadian Embassy involved status inquiries concerning these two draft proposed rules, and an OSHA rule concerning workplace exposure to asbestos. EPA suggested the one meeting with officials of the Brookings Institute. The telephone calls notified us of materials being sent to OMB. All of the written material was made available to the public and was provided to the subcommittee.

The first of the two draft rules was submitted in April 1984 and would have immediately banned four uses of asbestos. EPA advised us at the time that the second rule would be forthcoming, and we reviewed the two rules together. The second draft rule arrived in August 1984, and it proposed a ban of a fifth use of asbestos immediately, and a ban on all other uses of asbestos after a 10-year period. The regulatory analysis for these rules was not completed and submitted to us by EPA until October 1984.

Prior to October, OIRA staff met with officials of the EPA to discuss the many issues and questions raised by their proposal. These discussions continued until January 1985 when the rules were withdrawn by EPA. By letter dated March 27, 1985, OIRA advised EPA of several of the areas which OMB believed failed to comport with the principles articulated by the President. I would like to offer both of the aformentioned letters for inclusion in the record.

Senator **Durenberger**. Without objection, they will be made part of the record.

[The letters referred to follow:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

MAR 22 1985

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of March 11, 1985. Your letter asked for a response by March 18. I appreciate the extension of time you provided to us to respond.

You described the scope of your inquiry as "the Environmental Protection Agency's (EPA) draft proposed regulations regarding: (1) asbestos mining and import restrictions; and (2) manufacturing, processing, importation and distribution in commerce prohibition of asbestos reviewed by your Office pursuant to Executive Order No. 12291."

Your letter requested material described as:

1. "A list of all communications between the Office of Management and Budget (OMB) and its employees with any individuals or organizations outside the Federal government with regard to the proposed Environmental Protection Agency's (EPA) regulations or Section 9 of TSCA."

2. "The identity of all those individuals involved in such communications, the date of such communications and whether those communications were in person, by telephone or written."

3. "All written material received by the Office of Management and Budget proposed or provided by organizations or individuals outside the Federal government with regard to the EPA proposed rules or Section 9 of TSCA."

In discussions with your staff subsequent to the receipt of your letter, we agreed that the period of time of interest to the Subcommittee would be from January 1, 1984, until January 31, 1985, when these draft regulations were withdrawn from our review by EPA.

As you are aware, we are not required to keep lists of communications that you requested in paragraphs 1 and 2 above. In fact, only a few statutes impose such obligations on certain specified agencies, and then only for particular programs and for limited purposes. We are not subject to any such statute and we have never maintained such lists. Therefore, in order to furnish the information requested in paragraphs numbered 1 and 2, we have asked all those employees of OMB who were involved in or supervised the review of the regulations to furnish the information you requested. That information is provided in Tab A.

This list does not include communications between OMB's Public Affairs Office and the news media personnel and members of the public who call that Office. The list does not include questions regarding the status of OMB's review of these rules asked of the Administrator and Deputy Administrator of OMB's Office of Information and Regulatory Affairs (OIRA). These inquiries were from news media personnel and the public during question and answer periods following speeches, and no substantive responses were given in response to such inquiries. The list includes only present employees of OMB. The only former employee of OMB who may have had communications described in your request is the former Administrator of OIRA, Christopher C. DeMuth. Mr. DeMuth was succeeded by the current Administrator, Douglas H. Ginsburg, on July 16, 1984. Mr. DeMuth did not participate in the review of nor communicate with OMB on these draft rules subsequent to his departure. Finally, although we are confident that the information furnished in Tab A is accurate and complete, it is not information that we normally prepare or disclose. As I noted in my October 1, 1981 letter to you, the authorities and privileges governing access by one branch of government to information in another branch are not unqualified. Such access raises important issues involving balancing the legitimate needs and constitutional prerogatives of both the Legislative and Executive branches. After reviewing the material requested, and particularly in light of the fact that EPA has withdrawn these draft rules from our review, we have determined, under the circumstances and in the interest of cooperating with the Subcommittee, not to assert any privilege that would exempt from disclosure some of the material we have decided to supply, including the fact of our discussions as described in Tab. A. We, of course, reserve the right to reach a different conclusion in other circumstances that may involve similar documents.

The copies of documents requested in paragraph number 3 are furnished at Tab B. We have not included duplicates. Some of the documents prepared by organizations or individuals outside the Federal government were provided by other agencies. We have not included newspaper articles or other news or journal articles in our files.

We will be pleased to meet with you further to answer appropriate additional questions regarding your inquiry.

Sincerely,

David A. Stockman

David A. Stockman
Director

Enclosures

TAB A

Date	OMB Staff Member	Outside Contact	Type of Contact
1984	Gail B. Coad	John E. Kinney, Sanitary Engineering Consultant	Received several phone calls informing that he was sending materials. Stopped by once to leave some papers. (All of these materials are included in Tab B.)
Summer 1984	Brian Mannix	Canadian Embassy	Phone call to obtain copy of a report. (Included in Tab B.)
2/28/84	Christopher DeMuth	John E. Kinney, Sanitary Engineering Consultant	Letter to OMB*
5/22/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Received phone call, indicating he was sending materials. (Materials included in Tab B.)
5/23/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
5/29/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
6/5/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
6/13/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
6/18/84	John F. Morrall Brian Mannix Carlos Tellez Terry Grindstaff Nancy Wentzler	Professor Hans Weil, Brookings Institute and Tulane Medical School	Meeting

Date	OMB Staff Member	Outside Contact	Type of Contact
6/20/84	John F. Morrall Brian Mannix	Paul Lefleur, Canadian Embassy	Meeting
6/26/84	Gail B. Coad	John E. Kinney, Sanitary Engineering Consultant	Letter to OMB*
6/27/84	Gail B. Coad	John E. Kinney, Sanitary Engineering Consultant	Note to OMB*
9/21/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
9/25/84	Gail B. Coad	John E. Kinney, Sanitary Engineering Consultant	Note to OMB*
9/26/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Note to OMB*
11/15/84	Ed Dale	Jerry Zucker, ZS Associates	Letter to OMB*
11/26/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
11/28/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Letter to OMB*
12/12/84	John F. Morrall	B. J. Pigg, Asbestos Information Association	Note to OMB*
1/3/85	John F. Morrall	B. J. Pigg, Asbestos Information Association	Note to OMB*
1/29/85	Robert Bedell	Jacques Roy, Canadian Minister and one other individual from the ministry	Meeting

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*Document in Tab B

TAB B

Document No.	Document	Date
1	Implications and Consequences of EPA Asbestos Policy, from John E. Kinney	1984; specific date unknown
2	Note w/attachment to Gail Coad, OMB, from John E. Kinney	9/25/84
3	Ltr to Congressman Eldon Rudd, MC, from John E. Kinney	12/21/84
4	Documents to Gail Coad from John E. Kinney	12/84
5	Ltr w/enclosure to Congressman John McCain, MC, from John E. Kinney	1/8/85
6	Ltr to Senator James Abdnor, from John E. Kinney	7/31/84
7	Ltr to Gail Coan, OMB, from John E. Kinney, corrected copy sent with note 6/27/84	6/26/84
8	Agenda: Canada/U.S. Technical Discussions on Asbestos; participants: William Mansfield, Don Clay, EPA, Marcel Cossette, Dr. Rutstein, and Jacques Dunnigan, PhD and Arthur Langer, PhD, Mount Sinai School of Medicine	6/26/84
9	Ltr w/enclosures to Edward A. Klein, Director, TSCA Assistance Office, EPA, from Hans Weill, M.D., Brookings Institution	6/14/84
10	Testimony of Hans Weill, M.D. before OSHA Hearings on Occupational Exposure to Asbestos	6/19/84
11	Transcript of Proceedings, EPA, Response to SEIU Asbestos Petition	5/7/84
12	Ltr to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	9/21/84
13	Ltr to Paul Lafleur, from Arthur M. Langer, PhD, Mount Sinai School of Medicine	6/29/84

Document No.	Document	Date
14	Note w/attachment to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	1/3/85
15	Ltr to Dr. John A. Moore and A. James Barnes, Esq., EPA, from Edward W. Warren, P.C., Special Counsel to the Asbestos Information Association/North America	3/22/84
16	Ltr to Honorable Gary Nash, DOE, Mines and Resources, Ottawa, Canada, from John E. Kinney	4/24/84
17	Ltr to William D. Ruckelshaus, Administrator, EPA, from John E. Kinney	2/28/84
18	Ltr to Jamie Whitten, MC, from John E. Kinney	2/28/84
19	Ltr to Congressman Robert A. Young, MC, from John E. Kinney	3/24/84
20	Ltr to Christopher C. DeMuth, Administrator, OIRA, OMB, from John E. Kinney	2/28/84
21	Ltr to John E. Kinney, Sanitary Engineering Consultant, from William D. Ruckelshaus, Administrator, EPA	4/13/84
22	Ltr to John A. Moore, PhD, EPA, from Joan E. Young	10/9/84
23	Ltr to Ed Dale, OMB, from Jerry Zucker, ZS Associates	11/15/84
24	Note w/attachments to John F. Morrall, III, OMB, from B. J. Pigg, Asbestos Information Association	9/26/84
25	Ltr w/enclosures to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	11/26/84
26	Ltr w/enclosures to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	11/28/84

Document No.	Document	Date
27	Note w/attachments to John F. Morrall, III, from B. J. Pigg, Executive Director, Asbestos Information Association	12/12/84
28	Ltr w/enclosures to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	5/23/84
29	Ltr w/enclosures to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	5/29/84
30	Ltr w/enclosure to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	6/13/84
31	Ltr w/enclosure to John F. Morrall, III, OMB, from B. J. Pigg, Executive Director, Asbestos Information Association	6/5/84
32	Comparison Testing Monitoring for Airborne Asbestos Fibers: Vinyl Asbestos Floor Tile, from SRI International	12/79
33	Comparison Testing Monitoring for Airborne Asbestos Fibers: Sheet Vinyl Floor Covering, Wet Versus Dry Scraping, from SRI International	12/79
34	Monitoring for Airborne Asbestos Fibers: Vinyl Asbestos Floor Tile, from SRI International	12/79
35	Remarks Prepared for EPA Meeting "Pre-market Testing of Fibers", from Arthur M. Langer, PhD, Mount Sinai School of Medicine	6/26/84
36	Asbestos and Substitutes: A Need for Regulation for all Fibrous Materials, from Jacques Dunnigan, PhD	Date Unknown
37	Ltr to Congressman Robert A. Young, MC, Subcommittee on Public Buildings and Grounds, from John E. Kinney	3/24/84

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

MAR 27 1985

Mr. A. James Barnes, Esq.
Acting Deputy Administrator
Environmental Protection Agency
401 M Street, SW
Washington, DC 20460

Dear Jim,

By your memorandum of March 8, you initiated a review of the legal and policy considerations bearing on the use of Section 9 of the Toxic Substances Control Act of 1976, 15 U.S.C. 2608 (TSCA). I am sending for your consideration this summary of our views on certain of the issues raised by Section 9 in general, and on the application of Section 9 to asbestos in particular. Because EPA withdrew on legal grounds--with which we agree--its draft proposals to ban asbestos, OMB never concluded its review of the merits of those proposals. The analysis that EPA provided, however, indicated that the proposals were seriously flawed. Our discussion of those flaws here should help avoid similar problems arising in the future.

OSHA and EPA Rules

On February 13, 1984, the Occupational Safety and Health Administration (OSHA) submitted to OMB for review under Executive Order 12291 a draft proposed rule that would have tightened its exposure standard for asbestos from 2 fibers per cc to 0.5 f/cc. During its review, OMB concluded that an even tighter standard of about 0.2 f/cc appeared to yield greater net benefits. Accordingly, OSHA published an NPRM on April 10, 1984, that requested comments on both of these alternative standards.

On June 15, 1984, EPA submitted for review a draft proposed rule that would have banned four uses of asbestos beginning in 1985, citing essentially the same workplace risks that OSHA was responding to. EPA submitted a second draft proposed rule on August 15 that would have banned a fifth use of asbestos immediately, and would have banned all uses of asbestos by 1995.

Costs and Benefits of EPA Rules

In support of its draft rules, EPA submitted a Regulatory Impact Analysis (RIA) in March, which it updated in October. Subsequently, we asked the agency to supplement its analysis of the two rules, and to disaggregate the costs, benefits, and cost-effectiveness associated with each of thirty-odd use categories it had identified. Both TSCA and Executive Order 12291 require a balancing of costs and benefits in making regulatory decisions. From the data that EPA provided, it was apparent that the ten-year ban of all asbestos products did not meet this test. Summary measures of costs and benefits appear below; EPA's recent lead phasedown rule is included for comparison purposes.

COSTS AND BENEFITS OF PROPOSED ASBESTOS BANS
(assuming no OSHA action)
(millions of 1983 dollars, net present value in 1985)

Action	Costs	Benefits	Net benefits
Five-product ban	$547	$701	$154
Ten-year total ban	$2,408	$235	-$2,173
Lead phasedown rule	$2,643	$37,363	$34,720

(The numbers in this table are derived from EPA's most recent estimates. The monetized benefits use a value-per-cancer-case-avoided of $1 million. As required by EPA's guidance for Regulatory Impact Analyses, both costs and benefits are discounted to 1985: asbestos at 4%; lead at 10%. An attachment gives more detail.)

Taking OSHA into account

The estimates above do not take account of the fact that OSHA already is acting to reduce workplace risks associated with asbestos. Accordingly, OMB asked EPA to reestimate the benefits of its ban proposals assuming an OSHA standard of 0.2 f/cc.

COSTS AND BENEFITS OF PROPOSED ASBESTOS BANS
(OSHA standard at 0.2 f/cc)
(millions of 1983 dollars, NPV in 1985)

Action	Costs	Benefits	Net benefits
Five-product ban	$547	$110	-$437
Ten-year total ban	$2,408	$89	-$2,319
Lead phasedown rule	$2,643	$37,363	$34,720

The ten-year total ban of asbestos failed the benefit-cost balancing test by an overwhelming margin. The five-product ban also failed the test in the aggregate (and would even if the OSHA standard were 0.5 f/cc), but this did not hold true for each of the five individual products or use categories. At an OSHA standard of 0.2, for example, banning cloth had costs of $11 million and benefits of $29 million, for a positive net benefit of $18 million. In other words, it appears to be cost-effective to ban certain uses of asbestos, but not others.

Disaggregation by Use: Costs, Benefits, and Risks

The disaggregation of the costs and benefits for each use of asbestos is essential: only by considering the uses individually can a ban be justified. Furthermore, TSCA requires EPA to consider uses individually, including "the benefits of such substance or mixture for various uses and the availability of substitutes for such uses" (Section 6(c)(1)(C)). The draft rules would have banned some uses for which EPA had identified no risk at all, some uses where the risk was quite clearly not "unreasonable," and other uses for which the agency had identified no adequate substitutes.

EPA also failed to include in its analysis the possible risk associated with asbestos substitutes. Asbestiform fibers commonly are used as substitutes for asbestos and, according to a recent report to EPA by the National Academy of Sciences, also may cause cancer.[1] Other risks, potentially quite serious, could arise if asbestos substitutes turn out to be less effective than asbestos in some critical applications. EPA provided no data, for example, to demonstrate that banning asbestos in automobile brakes will not cause an increase in automobile accidents. In a recent letter to EPA, Stephen Margolis of the Centers for Disease Control noted:

> "Motor vehicles are the leading cause of death from injury. They are the leading causes of loss of life from age 1 to 44 and the leading cause of loss of preretirement years of life in the United States. Even a small amount of erratic brake performance could easily outweigh the potential morbidity and mortality saved by reducing ambient air asbestos by .23 to 1.3 percent. Much of this decrease could be gained by adequate work practices during mechanical servicing of brakes.
>
> A reduction in ambient air asbestos levels should be encouraged, but the elimination of asbestos in brake pads as a means of accomplishing this goal should be strongly weighed against the safety performance of alternatives."[2]

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[1] National Research Council. 1984. Asbestiform Fibers: Nonoccupational Health Risks. National Academy Press, Washington, D.C.

[2] Stephen Margolis, Ph.D., Chief of Environmental Affairs Group, Centers for Disease Control. Letter to EPA's TSCA Public Information Office dated February 6, 1985.

Considerations under Section 9

EPA's March RIA attributed 99% of the benefits of both draft to reduced exposure in the workplace. By the time EPA had completed its analysis in October, workplace exposure benefits were 87% of the total. The other 13% were attributed to reduced exposure to vinyl/asbestos floor tile. Only 0.003% of the benefits were attributed to reduced ambient exposure in the environment. Since OSHA has (and is exercising) authority to limit workplace exposure to asbestos, and the CPSC has (and has used in the past) authority to proscribe hazardous asbestos-containing products, this seemed a textbook case of overlapping authority and duplicative effort.

Section 9 of TSCA is intended to prevent duplication and overlap in the regulation of toxic substances, and provides procedures for handling such a case. It promotes the maximum cooperation and coordination among federal regulatory agencies by establishing a mechanism to complement--not supplant--other, existing laws. Under this Section, if another agency (or agencies) has adequate statutory authority to act to protect against risks associated with a toxic substance, EPA must notify the other agency and provide it an opportunity to act before the Administrator may proceed under TSCA. TSCA thus establishes a scheme of primary regulatory jurisdiction in which other agencies with authority to regulate certain toxic substances have primacy to regulate or not to regulate those risks that fall within their statutory spheres of responsibility.

For some of the same reasons set forth in your Acting General Counsel's legal opinion of January 31, 1985, EPA's authority under Section 9 is not discretionary. If the Administrator determines that an unreasonable risk "may be prevented or reduced to a sufficient extent" by the other agency, he must comply with TSCA's mandate that EPA submit a report and permit the agency the opportunity to respond. If EPA has doubts about the extent or scope of the other agency's authority, it must not interpret finally the requirements of those statutes, but must submit its report and permit the other agencies to make the legal determinations required by Section 9(a)(1)(A)(i)--including the legal determination of the scope of the statutes the other agency administers.

Section 9 does not allow EPA to disregard the referral mechanism on its own conclusion that comprehensive, unilateral regulatory action by EPA would be "most effective" or the "most efficient" means of regulating risks that fall within both its jurisdiction and those of other agencies. Congress decided that TSCA is a "gap-filling" statute and that other agencies have primary regulatory jurisdiction for risks within their respective authorities. Under the law, therefore, EPA must submit such matters to those other agencies.

Since asbestos may present some risks outside of the workplace and apart from consumer products, EPA should determine if any of the uses of asbestos present unreasonable risks that are not subject to the jurisdiction of OSHA or the CPSC. The largest source of such risks EPA has so far identified is vehicle brakes. As noted above, a careful consideration of the availability of substitute braking materials, and their costs, efficacy, and risks, is needed before the use of asbestos could be deemed an unreasonable risk.

It is also possible that, even after OSHA has adjusted its exposure limit for asbestos, the remaining risk in particular uses is unreasonable compared to the costs and risks of available substitutes. EPA's preliminary analysis suggests that this may be the case for certain uses of asbestos cloth. In this case, EPA and OSHA should consult and cooperate to assure that Section 9 fulfills its intended purpose: to resolve quickly which agency should use its authority to eliminate unreasonable risks.

There may arise cases in the future where only a small fraction of the risks associated with a chemical are subject to other agencies' jurisdiction. The practical effect of Section 9 in those cases may raise additional legal and policy questions. Those questions need not be resolved now, however, since the case at hand is not one in which the relevance of Section 9 is in doubt.

Our recommendations are that EPA:

- Prepare a Section 9 report to OSHA and the CPSC documenting any risks that EPA believes are unreasonable and that are subject to their jurisdiction, focusing on areas where EPA believes it has better information than the agencies with primary responsibility;
- Refine its own analysis to include estimates of the risk posed by asbestos substitutes in certain uses;
- Examine the residual risk that may remain associated with certain uses after OSHA and CPSC have responded to EPA's report; and
- Based on its expanded analysis, consider action under TSCA to ban individual uses of asbestos for which the residual risk, taking account of the risk of substitutes, is unreasonable.

Sincerely,

Robert P. Bedell

Robert P. Bedell
Deputy Administrator
Office of Information and
Regulatory Affairs

COSTS AND BENEFITS OF PROPOSED ASBESTOS BANS[1] AND THE LEAD PHASEDOWN

(millions of 1983 dollars, NPV in 1985)

Action	Costs	Benefits	Net benefits[2]
	(Discounted at 4%)[3]		
(assuming no OSHA action)			
Five-product ban	$547	$701	$154
Ten-year total ban	$2,408	$235	-$2,173
(OSHA standard at 0.5)			
Five-product ban	$547	$172	-$375
Ten-year total ban	$2,408	$116	-$2,292
(OSHA standard at 0.2)			
Five-product ban	$547	$110	-$437
Ten-year total ban	$2,408	$89	-$2,319
	(Discounted at 10%)		
(assuming no OSHA action)			
Five-product ban	$417	$162	-$255
Ten-year total ban	$1,430	$45	-$1,385
(OSHA standard at 0.5)			
Five-product ban	$417	$31	-$367
Ten-year total ban	$1,430	$22	-$1,408
(OSHA standard at 0.2)			
Five-product ban	$417	$16	-$401
Ten-year total ban	$1,430	$17	-$1,413
Lead phasedown rule[4]	$2,643	$37,363	$34,720

[1] The table includes only those costs and benefits that have been quantified. Reductions in mortality are valued at $1 million. This is the value-per-statistical-death used in EPA's final lead phasedown RIA dated January 1985.

[2] The costs and benefits of the five-product ban are EPA estimates, assuming no market adjustment (EPA Asbestos RIA, Appendix G, pg G-13). The costs and benefits of the ten-year ban provided by EPA included asbestos cloth in the ten-year ban, rather than in the five-product ban. OMB corrected for this by using EPA's raw data on the time-distribution of costs and benefits for the ten-year ban excluding cloth.

(more)

[3] NPVs of costs and benefits were calculated using both a 4% discount rate and the more customary 10%, as in the lead RIA. The original asbestos RIA discounted costs by 10% but did not discount benefits at all, and thus was internally inconsistent, as well as inconsistent with EPA policy. OMB suggested that a discount rate as low as 4% might be appropriate in this case, because the costs of banning asbestos largely take the form of reduced consumer surplus, whereas the costs of the lead phasedown involve capital expenditures for which a pre-tax rate of return is a more appropriate measure of opportunity cost.

[4] The costs and benefits of the lead phasedown are taken from EPA's final lead phasedown RIA, dated January, 1985, Summary Table I. Summary Table I of the RIA displays the costs and benefits accruing by year for 1985 through 1992 inclusive, and the net present values (NPVs) in the table above were calculated from these using the same 10% discount rate. Both costs and benefits continue to accrue in the years beyond 1992, but they do not significantly change the results and, due to discounting, would have a relatively small effect on the NPVs.

Mr. **Miller**. The third panel, as I understand it, would deal with our review of two OSHA proposed grain handling safety regulations. On January 6, 1984, OSHA proposed safety standards for grain handling facilities. The publication of this proposal followed several months of active discussion between representatives of the Department of Labor and OIRA. On April 11, 1984, OIRA filed public comments with the Department of Labor concerning our continued concerns that certain aspects of the proposal failed to comport with the President's principles. I would also like to offer a copy of this letter for the record.

Senator **Durenberger**. Without objection, it will be made part of the record.

[The letter and information referred to follow:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. [illegible]

April 11, 1984

Honorable Francis X. Lilly, Esq.
Solicitor
Department of Labor
200 Constitution Avenue, N. W.
Washington, D. C. 20210

Dear Frank:

The Occupational Safety and Health Administration's proposed safety standards for grain handling facilities (published January 6, 1984) raise a number of important questions concerning the assessment and control of occupational safety risks. We have reviewed OSHA's proposal and Regulatory Impact and Regulatory Flexibility Analysis and have prepared a detailed critique, which is enclosed.

Our review has led to primary conclusions. First, we believe OSHA's analysis to date has substantially overstated (a) the risks of fires, explosions, and other hazards in grain handling and (b) the likely effectiveness of the proposed standards in reducing the risks that do exist. As a result, the benefits of the proposed rule have been seriously exaggerated. Second, whatever the merits of the proposed standards for large and high-throughput grain handling facilities, the available evidence suggests they would be inappropriate for storage facilities such as feed mills and country elevators. Several of the individual standards in the proposed rule would be particularly ill-suited for these smaller facilities.

We know that OSHA is aware of these difficulties and is addressing them explicitly in the course of the rulemaking proceeding. We hope that our assessment will be helpful to OSHA and others in the Department of Labor as this proceeding goes forward.

Sincerely,

Chris DeMuth

Christopher DeMuth
Administrator for Information
and Regulatory Affairs

Enclosure

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OSHA'S PROPOSED STANDARDS FOR GRAIN HANDLING FACILITIES
April 1984

On January 6, 1984, the Occupational Safety and Health Administration (OSHA) published a notice of proposed rulemaking to set safety standards for grain handling facilities. 1/ The Office of Management and Budget offers the following comments on the proposal and its accompanying Regulatory Impact and Regulatory Flexibility Analysis.

I. Introduction

The primary objective of the proposed OSHA standards is to reduce the risk of injury and fatality resulting from explosions and fires in grain handling facilities. 2/ They would also mitigate other hazards, primarily those associated with worker entry into confined spaces such as silos, tanks, and bins. The standards would cover approximately 16,000 grain handling facilities and 200,000 employees.

1/ 49 *FR* 996.

2/ In preparing the proposed standard, OSHA drew upon a study of explosions in grain elevators and mills by the National Academy of Sciences, *Prevention of Grain Elevator and Mill Explosions*, Washington, D.C., 1982.

This section describes the proposed standards and the types of facilities they would cover. Section II analyzes problems in OSHA's appraisal of the benefits expected from the proposed rule. Section III shows that, whatever the merits of the proposed standards for large and high-throughput grain handling facilities, the evidence currently available does not support their application to other facilities such as country elevators and feed mills.

A. Coverage of the Proposed Rule

The proposal would cover grain elevators, feed mills and grain processing plants (such as flour mills and plants processing pet food, breakfast cereal, and malt), and oil seed processing plants. By far the largest number of facilities to be covered by the proposed standards are country elevators and small feed mills. Since most country elevators have feed mills and feed mills have elevator capacity, the distinction between these two categories is somewhat arbitrary. 3/ Essentially, both are small facilities with low throughput ratios (the ratio of grain handled by the facility during a year to the storage capacity of the facility). The throughput ratio is an important indicator of differences in function. A facility with a low throughput ratio is mainly a storage facility; grain is held for a substantial period of time. Facilities with high throughput ratios are

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3/ OSHA distinguishes between them according to whether more or less than half of revenues are derived from milling activities.

mainly transfer or merchandising facilities. In high-throughput-ratio facilities, grain is being moved into and out of the facility much of the time throughout the year, whereas periods of grain movement are much less in low-throughput-ratio facilities. This can have important safety implications, which are discussed further in Section III.

"Inland elevator" facilities are similar to country elevators, but have larger storage capacity (over 2 million bushels). Both "high-throughput inland elevators" and "export elevators" are distinguished by their high throughput ratios. They are generally more modern facilities than country elevators and inland terminals.

While most small feed mills are not much different from country elevators, large feed manufacturing plants constitute a distinct type of operation, for which elevator storage itself is not a primary function. Similarly, for oilseed and grain processing plants, elevator storage is only a minor function; only about six percent of the employees in these facilities are actually employed in grain handling.

It should be evident that the facilities to be covered by the proposed standards are highly diverse. This raises important questions about the proper scope of coverage of the standards, which are addressed in Section III.

The proposed standards would not apply to on-farm grain storage facilities. Partly because of government policies, on-farm storage capacity has been increasing significantly over the past decade. On-farm storage competes directly with country elevators. If compliance with the proposed standards raises the costs of country elevators significantly, this could accelerate the shift of grain storage to unregulated on-farm facilities.

B. Provisions of the Proposed Rule

The proposed OSHA rule consists essentially of three different types of provisions:

- a dust control provision, to avert explosions and fires by controlling the accumulation of layered dust;
- various ignition control provisions, to avert fires and explosions by controlling sources of ignition from sparks or overheating, and
- provisions to control hazards other than fires and explosion, such as suffocation in grain, being overcome by toxic fumes, or being caught in moving machinery.

Some provisions overlap the second and third of these categories. Several provisions also provide for easier escape in the event of emergency.

1. Dust control provision

Dust suspended in the air (generally as the result of the operation of grain-moving equipment) is known to be a prerequisite for grain elevator explosions. The proposed standard does not directly address this hazard (though pneumatic dust control equipment, which may be used for compliance by some facilities, does reduce suspended dust.) The proposal directly addresses the hazards of secondary explosions. These occur when the shock from an original explosion lifts layered dust off the floor or other surfaces and newly suspended dust is ignited to produce a secondary, and frequently more serious, explosion. Under the dust control provision of the proposed rule, employers would be required to adopt measures to control layered dust accumulations. An employer may comply with the requirement by choosing one of three dust control programs:

- a one-eighth inch action level, under which the employer would establish a program for employers to begin cleaning up layered dust whenever it exceeded 1/8-inch deep over a floor area of 200 square feet or more; or

- a once-per-shift housekeeping program, under which the employer would establish a systematic program for cleaning up layered dust at least once a shift when the facility is in operation; or

- installation and maintenance of pneumatic dust control equipment.

In preparing for this rulemaking proceeding, OSHA contracted with Arthur D. Little, Inc. (ADL) to perform a study to be the basis of OSHA's preliminary Regulatory Impact Analysis. The ADL study limited its analysis of dust control provisions solely to an action-level standard (1/8-inch or, alternatively, 1/64-inch). The study revealed that the costs of a 1/8-inch action level provision ($105.6 million annually) would be more than twice the benefits ($48.5 million annually). 4/ This was particularly troublesome because the dust control provision by itself would have accounted for 86 percent of the total costs of the proposed standard. Subsequently, OSHA adopted the three-part dust control provision described above. To the extent that facilities are able to comply with the dust control provision by means of the once-per-shift housekeeping alternative, OSHA anticipates substantially lower costs for the dust control provision.

2. Ignition Control Provisions

More than half of the expected costs of ignition control measures would be for compliance with a provision for inside bucket elevator legs. The leg is the part of the elevator that

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4/ Arthur D. Little, Inc., Technical Feasibility and Economic Impact Analysis (EIA) for Various Standards Provisions Applicable to Hazards in Grain Handling Facilities, February 1983, V. II, pp. E-21, G-3.

houses a vertical belt bucket conveyor, which raises the grain for placement into storage. The leg is particularly dangerous as a source of explosions because the movement of the grain causes potentially explosive grain dust to be suspended in the air and because the movement of mechanical parts creates several potential sources of ignition. The provision would require the installation of several automatic devices to monitor bearing heat and belt operation. Other leg provisions require electrical grounding and inspection doors and prohibit unsafe means of freeing a choked leg.

The second most costly ignition control provision requires the installation of grates or magnets to remove from the moving grain stream ferrous materials that could cause sparks. Two partially overlapping provisions establish this requirement--grate openings (paragraph j) and grain stream processing equipment (paragraph m).

Another provision requires the installation of automatic shut-off devices on grain driers to prevent fires originating in grain driers from spreading. Another provision requires fabric dust filter collectors for facilities with pneumatic dust control equipment; since only a small fraction of facilities have such equipment the costs of this provision are a miniscule fraction of the total costs of the proposed standard.

Remaining ignition control provisions require the establishment of various procedures: a safety training program, a permit system for hot work, a system for informing contractors of hazards and safety procedures, and a program of regularly scheduled inspection and maintenance. The training program is estimated to be the most costly of these.

3. Provisions For Hazards Other Than Explosions and Fires

Less than five percent of the costs of the proposed standard would be for compliance with provisions addressing hazards other than explosions and fires. The most serious such hazard is suffocation in grain. This is addressed by a requirement that employees entering a grain bin wear a safety harness and that a trained observer be provided whenever bin entry takes place. This requirement is part of the bin entry provision, which accounts for most of the costs of measures addressing hazards other than fires and explosions. The bin entry provision also contains a procedure for disconnecting or locking potentially dangerous equipment when bin entry occurs. The most costly part of the bin entry provision is the requirement to test the atmosphere in the bin before entry and if certain levels cannot be met, then the employee must wear respirators when entering the bin; to meet this requirement facilities would need to have a gas detector/oxygen monitor and a respirator.

II. Expected Benefits of the Proposal

The preliminary Regulatory Impact Analysis (RIA) contains a number of errors in its estimates of the benefits from the proposed rule:

- effectiveness assumptions are unreasonably high,
- unrepresentative years are included in baseline risk estimates,
- fire risk estimate reflects biased sample,
- risks from hazards other than fire and explosion are overstated, and
- property damage and business interruption loss estimates appear too high.

We recommend that OSHA revise the RIA in these areas as discussed below, and expect such revision will show the proposal to be substantially less beneficial than the present RIA indicates.

A. Overoptimistic Effectiveness Assumptions

The RIA assumes that the proposed standards would reduce explosions in grain handling facilities by 71 percent, fires by 74 percent, and suffocations by 100 percent. These effectiveness rates are implausible.

Any projection of the effectiveness of a new OSHA safety standard must begin with the realization that OSHA's existing safety rules (aimed presumably at the most serious safety problems) have had very little and perhaps no effect on occupational accident rates. After reviewing injury and death rate trends, the leading scholar in the field, W. Kip Viscusi, recently concluded:

> The death rate statistics, which are much more reliable, provide the weakest evidence for OSHA's efficacy. Manufacturing death rates were declining before OSHA's existence, and in the 1970's BLS manufacturing death rates remained virtually unchanged. The pattern of death rates for the entire economy continued to be almost identical to the pre-OSHA pattern. Workplace risks have continued to decline by about 2 percent annually, roughly the same rate as before OSHA's existence. Moreover, since the absolute level of injuries is now less, the relative invariance in the percentage rates of decline implies much smaller absolute decreases in worker risks since the advent of OSHA. 5/

5/ W. Kip Viscusi, Risk By Choice: Regulating Health and Safety In the Workplace, (Cambridge, Mass.: Harvard University Press, 1983) p. 31.

Viscusi's review of the econometric evidence also concluded:

> There is good reason to be skeptical of any evidence showing that OSHA had an impact on job risk levels. 6/

Most other studies have also found that OSHA's safety regulations and inspection programs have had an insignificant effect, although one unpublished study by Bartel and Thomas did find that the OSHA inspection program had a positive, albeit small effect. Bartel and Thomas found that the elimination of the entire inspection program would only increase lost workday rates by 4 percent. 7/ To date, no careful assessment of OSHA safety programs has found effectiveness rates even one tenth as high as ADL and OSHA have assumed for the grain handling standards.

A persuasive explanation for the findings that workplace safety standards have been ineffectual is that private safety incentives are already greater than those provided by government rules. Accidents are costly to employers because of property loss, Workers' Compensation, tort liability, and the need to pay

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6/ Viscusi, p. 35. For similar conclusions, see Lawrence Bacow, Bargaining for Job and Health (Cambridge, Mass.: MIT Press, 1980), John Mendeloff, Regulating Safety (Cambridge, Mass. MIT Press, 1980), and David McCaffrey, "An Assessment of OSHA's Recent Effects on Injury Rates," Journal of Human Resources (Winter, 1983).

7/ See Ann P. Bartel and Lacy Glenn Thomas, "OSHA Enforcement, Industrial Compliance and Workplace Injuries," (mimeo, Columbia University Graduate School of Business, December 1982).

higher wages to compensate for greater employment risks. The danger of an injury, such as an explosion in a grain handling facility, is usually known. Employees learn of the risks that they face in a particular industry through media reports, conversations with other workers, union information, job descriptions, and safety statistics. Employees thereby demand higher wages to compensate for the added safety risks. Viscusi found that:

> The similarity of the findings using subjective and objective measures of risk lends strong empirical support to the validity of the risk premium analysis. The safety incentives created by market mechanisms are much stronger than those created by OSHA standards; a conservative estimate of the total job risk premiums for the entire private sector is $69 billion, or almost 3,000 times the total annual penalities now levied by OSHA. Whereas OSHA penalties are only 34 cents per worker, market risk premiums per worker are $925 annually. This figure would be even higher if we added in the premiums that are displaced by the Workers' Compensation system, which provides an additional $11.8 billion in compensation to workers. 8/

Because the employee can command a higher relative wage for the riskier jobs, the employer has a strong incentive to provide an effective workplace safety program to reduce the risks in those jobs. If an injury occurs, then the employee or his survivor is able to demand compensation from his or her employer through the Workers' Compensation system or a tort action. The clear link between the injury and the workplace where that injury occurred

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8/ Viscusi, p. 44.

results in direct and indirect payment of part of the injury costs by the employer. Thus, because OSHA safety regulations are overlaid upon a system that already has strong natural incentives to reduce risks, one should not realistically expect those regulations to make significant improvements in safety.

Moreover, even if safety standards did provide significant additional incentives, the set of accidents potentially preventable may be small. Many of the causes of workplace accidents are simply beyond the reach of regulation. Not all injuries are due to violation of safety regulations, and many of those that are may be due to brief or intermittent violations unlikely to be detected by inspectors or anyone else. John Mendeloff, in a review of studies that examine accident causality, concludes that only 5 to 10 percent of all injuries are caused by "detectable" violations, with the lower estimate the more likely. 9/

There is no reason to believe that the grain handling industry is sufficiently different from industry in general to justify the 70 to 100 percent effectiveness assumptions compared to the zero to five percent effectiveness rates found in previous studies. In fact, there is reason to believe that there is less potential for OSHA safety rules to be effective in reducing risks in the grain handling industry.

9/ Mendeloff, pp. 85-87.

First, for half (or more, depending on the data source) of reported grain handling fires and explosions, the source of ignition is simply unknown. Furthermore, many of the causes are unlikely to be affected by the OSHA proposal or any other regulations. The National Academy of Sciences report concluded that:

> The contribution of human operatives and external factors other than the immediate physical aspects (e.g., people's attitudes, insurance practices, and government regulation) often are a major part of the problem and often are overlooked. 10/

According to a Canadian study, 14 percent of fires in Canadian primary (small) grain elevators were attributable to arson, and most of the 24 percent of undetermined origin were believed also to be due to arson. 11/ Nothing in the proposed rule would reduce the risk of arson. If the U.S. situation is similar to the Canadian, the proposed regulation would have to avert close to all inadvertent fires in order for the effectiveness rate assumed by OSHA to be realized.

Second, the private incentives to reduce risk in the grain handling industry are particularly strong because multiple death explosions (the main cause of deaths in grain handling facilities) have been highly publicized.

10/ National Academy of Sciences, p. 9.

11/ Western Grain Elevator Association, Fire and Explosion Task Force Report #2, Winnipeg, Manitoba, November 1980, p. 32.

After major dust explosions occurred in December 1977, killing 54 people, both public and private groups publicized the problem, investigated its causes, and proposed solutions. OSHA issued a grain elevator alert with recommended and required procedures to reduce the risk in these facilities. In issuing the general alert, OSHA stated that the National Fire Protection Association's consensus standard for "Grain Elevators and Bulk Grain Handling Facilities" would serve as an instrument to support OSHA enforcement under the general duty clause of the OSH Act. OSHA stated that it would give top priority to inspecting grain elevators. Grain inspectors for the USDA's Federal Grain Inspection Service were instructed not to inspect facilities that had any of ten specified types of hazardous conditions representing immediate danger. This absence of grain inspections would effectively result in the shut-down of dangerous facilities. At the same time, the National Grain and Feed Association issued guidelines addressing safety issues such as welding and cutting, safety training and fire drills, preventive maintenance, good housekeeping, and enforcement of no-smoking rules. Finally, for one of the 1977 explosions, that in a Continental Grain elevator in Westwego, Louisiana that killed 36 people on December 22, 1977, litigants filed suits to recover in excess of $30 million in damages, thereby creating an immediate and powerful incentive for other grain facilities to tighten their safety programs. It seems reasonable to infer that the sharp decline in explosion fatalities since 1976 and 1977--from an average of 44 deaths per year to an average of seven per year over the following six years--reflects changes in the safety environment of the industry, resulting from employers' and employees' increased awareness of explosion risks and their potential costs, and effective measures to counteract them.

Because the reduction in the number of deaths from the 1976-77 period to the 1978-83 period already represents an effectiveness rate of over 80 percent for the private and public steps that have already been taken, it seems highly unlikely to expect another 71 percent reduction in deaths from explosion due to the proposed regulations.

B. Baseline Risks Based on Unrepresentative Years

OSHA projects future risks based on data from the period 1976-82. This leads to an apparent upward bias in the estimates of baseline risk and consequently of the safety benefits from the proposed standard. Because the safety record in this industry has improved significantly since the several severe explosions in 1976-77 and subsequent corrective steps, the period after the 1976-77 explosions would provide a more accurate picture of the industry safety environment in which the OSHA standard will operate.

By deriving baseline risk from 1976-82 data, OSHA concludes that 19 deaths may occur annually due to grain explosions. By contrast, using data for the most recent 6-year period (1978-83) to derive baseline risk would indicate that 7 deaths may occur annually due to grain explosions. The RIA estimates that the standard would avert 13 deaths due to explosions each year (71% times 19). However, the total number of deaths from explosions has never exceeded 13 in any year subsequent to 1977 and fell to zero in 1983 for the first time since 1961. 12/

C. Risks From Fires Based on Biased Sample

The RIA estimates that fires in grain handling facilities cause 4.8 fatalities and 896.5 injuries per year. The RIA multiplies the number of deaths per year found in the National Fire Prevention Association's (NFPA) Fire Incident Data for 1976-1981 by a factor of about five to account for underreporting. Five was chosen because the Department of Agricultures' Catalogue of Explosion Incidents identified five times as many explosions as the NFPA Fire Incident data base identified. The RIA reasoned that the NFPA data file must also have undercounted major fires by a factor of five.

12/ Deaths from explosions have the following pattern:

1976	22	1980	10
1977	65	1981	13
1978	8	1982	12
1979	2	1983	0

Source: U.S. Department of Agriculture, Federal Grain Inspection Service.

Using this factor of five, the RIA extrapolates from the NFPA average of 11 major fires annually to 55. The 44 major fires added by this procedure are assumed to have the same characteristics in terms of casualties and property damage as the 11 known fires per year from the NFPA reports. However, the NFPA data base is assembled by compiling newspaper reports of fires causing over $10,000 in damage. It is likely that the fires discovered through newspaper reports are significantly more serious than the unreported fires. The ADL study points out that it would be misleading to base death and injury estimates for explosions on this sample "because they are biased towards the more severe events in terms of casualties." 13/ Although the NFPA data on explosions records only 20 percent of the explosions that the USDA data includes, it contains 97 percent of the fatalities and 49 percent of the injuries from explosions. 14/ To correct the bias in the RIA, more appropriate estimates of casualties from fires would be obtained by dividing the NFPA death estimates by 0.97 and injuries by 0.49 rather than the 0.2 used. This method produces about 0.9 deaths and 8 injuries from the assumed 55 "major" fires per year, compared to 4.8 deaths and 44 injuries estimated by the RIA.

13/ Arthur D. Little, p. V-9. Although the RIA is almost identical to Volume I of the ADL report, the paragraph containing this quote does not appear in the RIA.

14/ Calculated by comparing table IV-7 with table V-8 of the Arthur D. Little study.

From another data source (that was discontinued in 1975), the RIA estimates that 2,200 fires in grain handling facilities are reported each year to fire departments. It then assumed that on average each of 2,145 minor fires (2,200 total fires minus 55 major fires) produced casualties at one half the rate (or 0.4 per fire) of the major fires. This assumption is arbitrary and is made without any supporting discussion, and it appears to us to be an overstatement of casualties in "minor fires." Even if the assumption is maintained, however, simply correcting for the bias in the major fire estimates reduces the number of injuries from other fires by one half, or from 858 to 428. We believe even this number would be seen to be a significant overestimate if accurate empirical information on casualty rates in minor fires were employed.

D. The RIA overstates risk of death from hazards other than fires and explosions by improperly extrapolating a sample study of fatal accidents

The RIA estimates deaths from hazards other than explosion and fire by extrapolating from a study of OSHA investigations into the cause of fatalities in the 26 federal OSHA states plus Iowa. 15/ The estimate of deaths from other causes is increased by a factor of 2.8 because the number of deaths from fires and

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15/ U.S. Department of labor, "Selected Occupational Fatalities Related to Grain Handling As Found in Reports of OSHA Fatality/Catastrophe Investigations" (January 1983).

explosions identified in the sample was a small fraction of the RIA's estimate for the whole country.

There are three reasons why this procedure produces an upwardly biased estimate. First, excluded from the investigations of fatalities but occurring in the sample were 54 deaths from two explosions. They were excluded because of "remaining unresolved legal problems." 16/ Second, as pointed out above, the RIA's estimate of deaths from fires is overstated because of faulty extrapolation. Instead of 4.8 deaths per year from fires, a more realistic estimate is 0.9. Third, the twenty-six federal OSHA states plus Iowa that make up the sample contain about 75 percent of the grain handling facilities in the U.S. 17/ If risks ~~are proportional~~ to the number of facilities by state, the extrapolation factor should be 1.3 rather than the 2.8 used. This factor is confirmed if the corrections implied by points one and two above are made. Adding the fifty-four explosion deaths improperly excluded from the 27-state sample produces 15.2 deaths per year from fires and explosions. Subtracting the RIA's overestimate of fire deaths of 3.9 per year from the total produces 19.6 deaths from fires and explosions for the full 50-state sample. The ratio of 19.6 to 15.2 is 1.3, the same factor produced by comparing the number of grain facilities in the two studies. Thus 1.3 is confirmed as the proper factor by

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16/ See "Selected Occupational Fatalities," p. 10.

17/ Calculated from Table B-1, p. B-4 of Arthur D. Little report.

which to multiply the estimate of the deaths from other hazards from the 27-state sample. This produces an estimate of 19.5 deaths from other causes per year, rather than the 41.3 calculated in the RIA.

E. Property Damage and Business Interruption Loss Estimates Appear High

Property damage and business losses are predicted to decline by about $98 million per year, comprising 65 percent of the benefits of the proposed regulation per year. These estimates are high, in part because they are based on the NFPA sample fire incident data discussed above. These data, which are assembled from newspaper reports, included property damage estimates for less than 20 percent and business interruption losses for about 5 percent of the total explosions and "major" fires OSHA estimates have occurred. The RIA assumes that these data are representative and multiplies the estimates by factors of five and twenty, respectively. The small sample based on newspaper reports is clearly biased toward the most serious fires and explosions, as the ADL study acknowledges. 18/ As noted earlier, although the NFPA sample included only 20 percent of the explosions, those explosions caused 97 percent of all deaths and 49 percent of all injuries.

18/ See ADL, p. V-9.

The RIA also assumes that for the 2,145 nonmajor fires, property damage and business interruption loss averaged $18,212 per fire and that one half of these fires occur in country elevators. These numbers are completely arbitrary. There is no evidence in the RIA pertaining to the damage caused by these "minor" fires.

If the damage estimates for explosions and major and minor fires are totaled and divided by the number of country elevators (10,415), the "expected" property loss per country elevator implied by these estimates is about $5,500. This number appears high. But if true, it suggests that private owners have powerful incentives to reduce the risks of fires and explosions, probably more powerful than the incentive provided by fines and penalties for violation of OSHA regulations. 19/

19/ According to Viscusi, the average establishment's expected fine per year for violating OSHA regulations is only $7.08. The chance of inspection is one out of fifty, an average inspection results in 2.1 violations, and the average penalty is $193. (See Viscusi, p. 24).

III. Analysis of Specific Segments and Provisions

This section discusses the applicability of the proposed standards to different segments of the grain handling industry. Part A shows that the distribution of safety hazards among the different segments is highly disproportionate to the relative distribution among those segments of the costs of complying with the propsed standards. Two partially overlapping segments, small facilities and feed mills, raise special issues, which Part B examines in detail.

A. Distribution of Risks and Compliance Costs by Segment

The first part of this section discusses fire and explosion hazards and treats them together because all of the proposed standards that address one of these hazards also address the other. From the perspective of this rulemaking, fires and explosions are not separable hazards. Other hazards, such as suffocation in grain, are separable and are discussed in the second part.

1. Fires and Explosions

Table 1 indicates the risks from fires and explosions in the five major segments of the grain handling industry. The figures there were derived from the Regulatory Impact Analysis's estimate

TABLE 1

RISK FROM EXPLOSIONS AND FIRES BY SEGMENT
(annual rate per 100,000 employees, 1976-82)

Industry Segment	Fatalities	Moderate-Severe Injuries	Minor Injuries
Country elevator	5.4	51.2	679.1
Inland elevator	48.9	269.0	2,089.7
High-throughput and export elevator	105.9	100.4	327.8
Small feed mill	5.9	33.0	253.5
Large feed mill	2.0	11.0	39.9
Other grain handling	4.6*	38.3*	376.8*
Total	11.9**	45.9**	413.3**

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* Calculations were based on 70,310 employees in the "other grain handling" segment. Of these, 4,390 handle grain. If the latter figure were used, the rates would be 72.9 for fatalities, 612.8 for moderate-to-severe injuries, and 6,389.5 for minor injuries.

** Using 4,390 for the number of employees in "other grain handling" gives risk rates for all segments of 17.8 for fatalities, 68.8 for moderate-to-severe injuries, and 650.9 for minor injuries.

Sources: RIA, pp. I-3, VIII-7, and ADL, vol. 1, pp. V-10, VII-37.

of "baseline risk," which is the annual average for 1976-82. 20/ Table 1 has one inescapable implication: Risk rates are substantially higher in the large elevator segments (inland elevators, high-throughput terminal elevators, and export elevators) than in the other segments of the industry. The only exception is high-throughput and export elevators for minor injuries. Minor injuries are relatively insignificant injuries that do not require hospitalization (e.g., minor burns or abrasions, sprains). It is important to understand the reason for this difference in risk rates between segments in order to properly tailor the final regulation to the hazard environment of the industry.

The higher risk rate in the large elevator segment appears to be the result of the higher throughput ratio (the ratio of annual grain throughput to total grain storage capacity) of many facilities in this segment. To see this, note first that the higher risk rate of large elevators for fatalities and moderate-severe injuries shown in Table 1 is due to explosions, not fires. Fire risks are distributed fairly evenly across

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20/ It should be noted that deaths and injuries from explosions and fires in grain handling facilities include those of persons who are not employees of the facilities, such as fire fighters and bystanders. Therefore, the risk rate shown does not, strictly speaking, represent the risk that an employee will be killed or injured by explosion or fire in a grain handling facility. The risk rates shown are the most reasonable that can be derived, since it is obviously not possible to define precisely the population at risk in addition to the employees. There does not seem to be any reason why this would distort comparisons between different segments of the grain handling industry, though one must take care in comparing the risk rates here with employee risk rates in other industries.

segments; however, they account for relatively few fatalities or moderate-severe injuries compared to explosions.

Grain dust suspended in the air is a prerequisite for a grain elevator explosion. The operation of machinery to move grain into or out of the elevator causes the dust to become suspended. In a high-throughput-ratio elevator, grain-moving equipment is operating a larger fraction of the time than in a low-throughput-ratio facility. Hence, the high-ratio facility is at risk of explosion for a greater period of time. Indirectly, OSHA's proposed rule appears to recognize the significance of high throughput. It defines the small facilities, for which the applicability of the dust control provision would be deferred, in terms of throughput as well as capacity.

This analysis suggests that the standard should only be applied to large or high-throughput elevators. This segment is where significant risk exists. For additional evidence on this issue, Table 2 shows the share of different segments in total grain handling industry casualties from fires and explosions, together with the share of each segment in the costs of compliance with those provisions in the proposed rule addressing fire and explosion hazards. It shows, for example, that while 14.5 percent of deaths from fires and explosions in the grain handling industry occur in country elevators, 32 percent of the total cost of complying with proposed provisions addressing fire and explosion hazards would be borne by country elevators.

TABLE 2

SHARE BY SEGMENT IN RISKS AND COMPLIANCE COSTS OF EXPLOSIONS AND FIRES (percent)

	Fatalities	Moderate-Severe Injuries	Minor Injuries	Cost of Compliance
Country elevators	14.5%	35.4%	49.3%	31.9%
Inland terminals	7.7	11.0	8.9	8.0
High-throughput & export terminals	57.4	14.2	4.9	9.9
Small feed mills	3.8	5.5	4.5	21.4
Large feed mills	3.0	4.2	1.6	21.4
Other grain handling	13.6	29.8	30.8	7.4

Sources: RIA, pp. I-3, VII-56, VII-70, VII-71, and ADL, vol. 1, pp. V-10, and vol II, pp. G-7 to G-21. Compliance costs are for all provisions except D (Emergency Plan), G (Bin Entry) and O (Preventive Maintenance). The costs were calculated on the assumption that one-third of the facilities in each segment complied with each of three alternative means of compliance with the dust control provision: the 1/8-inch action level, thorough housekeeping, and brush-by housekeeping.

Table 2 suggests that feed mills, and to a lesser degree country elevators, bear a share of the cost that is disproportionately large in relation to their risk, while large elevators and other grain handling facilities bear a disproportionately small burden. These comparisons are only suggestive, but they are further evidence that the proposed rule may be inappropriate for small facilities and/or feed mills.

The preceding analysis suggests that the costs of the proposed standards are disproportionately high in relation to the safety hazards for low-throughput-ratio segments of the grain handling industry. Provisions requiring installation of ignition-control devices may be especially cost-ineffective for low-throughput facilities. This is because ignition-control devices only are needed to protect against explosions when suspended dust exists, and in low-throughput-ratio facilities suspended dust prevails only a small fraction of the time. The need for any regulation of the low-risk segments of the grain handling industry has not yet been substantiated. In any event, OSHA should take a particularly searching look at three provisions requiring installation of potentially costly ignition-control devices: 21/

21/ A fourth costly ignition-control provision is that for fabric dust filter collectors. However, most of the facilities that would be required to install them probably are large, high-throughput facilities.

a. Inside bucket elevator legs (paragraph p). This is the most expensive of the three (an average of about $2,000 present value per facility or $340 per employee for country elevators). Much of this expenditure is for various automatic equipment-monitoring devices. They include: belt-speed monitoring devices, conveyor equipment interlock devices, bearing temperature monitoring devices, and belt-alignment monitoring devices. (Retrofitting of inspection doors is also part of this provision.) In large, high-throughput facilities, such devices may be more effective--and their cost less burdensome--than in other facilities. The much lower baseline risk of explosions in other facilities makes these devices less necessary.

b. Grain driers (paragraph o). Over 97 percent of the costs of this provision (requiring installation of automatic shut-off devices on grain driers) would be borne by country elevators and small feed mills where risk is low. The RIA indicated that less than one in a thousand grain drier fires develops into a major fire. Apparently the grain drier operator shuts off the drier before anything serious develops in almost all cases. What produces the rare major fire appears to be unknown.

c. Grate openings (paragraph j). This provision requires that grates or magnets be installed to remove foreign objects from the grain stream entering the leg. The RIA does not allow the costs or safety effects of this provision to be evaluated, because it computes only the combined effects of paragraph (j) and paragraph (m). Paragraph (m) establishes a similar requirement to remove foreign objects from the grain stream entering processing equipment, such as hammer mills. The reason the RIA combined the analysis of the two provisions is that a facility automatically complies with paragraph (m) if it complies with paragraph (j). However, assuming that some facilities do not possess the grain processing equipment covered by paragraph (m), we suggest that OSHA try to estimate what changes in safety and costs would occur if paragraph (j) were deleted while paragraph (m) is retained. This is particularly important because the potential hazards of foreign objects entering grain processing equipment seem to be more firmly established than the possible hazards from foreign objects elsewhere in the grain stream. 22/

2. Hazards Other Than Fires and Explosions

In the absence of data on the distribution by segment of deaths and injuries from hazards other than fires and explosions, the RIA assumes that the risk rate per employee is the same in each segment, i.e., that the number of such deaths and injuries in each segment is proportional to employment in that segment. The first column of Table 3 presents the share of each segment in total casualties from hazards covered by the proposed rule other than fires and explosions. Fatalities and injuries are not presented separately, as in the preceding tables, because by

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22/ National Academy of Sciences, p. 50.

OSHA's assumption the percentage distribution among segments is the same for fatalities and different types of injuries.

The second column of Table 3 presents the share of each segment in the total costs of compliance with those provisions of the proposed rule addressing risks other than fires and explosions. The most striking comparison in Table 3 is that while country elevators and small feed mills account for only 39 percent of the casualties, they bear 94 percent of the cost of compliance. Once again, this strongly indicates that the proposed provisions may be inappropriate for small facilities.

The most suspect of the provisions dealing with hazards other than fires and explosions is that for bin entry testing and respirators (paragraph g(1)). This would generally require each facility to have a gas detector/oxygen monitor and a respirator. The gas detector/oxygen monitor in particular would seemingly make a negligible contribution to the safety of small fatalities, because their small scale of operations and number of employees implies there will be relatively few occasions when this device will be needed. In its study of selected fatalities in grain handling during 1977-81, OSHA found only two fatalities due to inhaling hazardous vapors, neither of which would have been averted by this provision. In one case, the employee failed to follow the proper procedures in which he had been trained. In

TABLE 3

SHARE BY SEGMENT IN RISKS AND COMPLIANCE COSTS FOR COVERED HAZARDS OTHER THAN EXPLOSIONS AND FIRES (percent)

	Fatalities and Injuries	Cost of Compliance
Country elevators	31.4%	71.9%
Inland terminals	1.9	0.9
High-throughput & export terminals	6.4	0.4
Small feed mills	7.6	22.1
Large feed mills	17.3	2.1
Other grain handling	35.4	2.6

Source: RIA, p. I-3, A.D. Little, vol. II, pp. G-7 to G-21. The costs of compliance are the present value of the costs for provisions D (Emergency Plan), G (Bin Entry) and O (Preventive Maintenance).

the other, the employee was overcome by vapors from fumigants that he had carried into a grain bin; while wearing a respirator probably would have averted this fatality, testing the atmosphere in the bin before the worker entered certainly would not have. 23/

23/ OSHA, "Selected Occupational Fatalities Related to Grain Handling as Found in Reports of OSHA Fatality/Catastrophe Investigations," January 1983, pp. 40-41.

We also suggest that OSHA re-evaluate the estimates of hazards due to causes other than fires and explosions. OSHA should try to acquire empirical data on the distribution of these hazards by segment, rather than simply assuming that the risk rates are identical for each segment. If empirical data cannot be obtained, the assumptions should at least be revised in one crucial respect. In applying the assumption that the risk per employee is constant, the RIA uses the total number of employees in the "other grain handling" segment, rather than the much smaller number of employees in that segment who actually handle grain. It is reasonable to consider all employees to be at risk from fires and explosions, because these hazards endanger persons outside the grain elevator. However, the assumption is not reasonable for hazards other than fires and explosions. Employees not engaged in grain handling are not at risk from suffocation in grain and similar hazards. The effect of the incorrect assumption is to overstate greatly deaths and injuries from hazards other than fires and explosions in the "other grain handling" segment relative to the other segments.

B. Problem Segments: Small Facilities and Feed Mills

The analysis in Part A of this section suggests that a regulation such as that proposed here would be inappropriate for other than large or high-throughput elevators (inland, high-throughput, and export elevators). Before issuing a final rule that extends beyond these facilities to other segments of the grain handling industry, OSHA should develop further evidence that a significant risk exists and that the proposed rule is properly designed for the characteristics of these segments. The need to design standards that take proper account of varying circumstances in different segments of the industry has been stressed by the National Academy of Sciences:

> Proposals for reducing the explosion hazard must take into account the great variation in types and sizes of elevators and mills in dust control systems, in types and amount of grain handled, and in the treatment the grain receives in the elevator or mill. 24/

In the remainder of this section, we consider the specific cases of small facilities and feed mills.

1. Small facilities

As we have seen, the risk from explosions is much lower in small elevators than in large ones. This pattern is not unique to the United States. The Canadian task force study found a vast difference in explosion risks between Canadian primary (small) elevators and terminal and transfer (large) elevators. In fact, Canadian primary elevators have never experienced a severe explosion. 25/

24/ *Prevention of Grain Elevator and Mill Explosions*, p. 18.

25/ Western Grain Elevator Association, p. 4.

According to the analysis performed for OSHA by A.D. Little, the annualized costs of the propcsed rule (if the dust control provision were uniformly complied with by meeting the 1/8-inch action-level standard) would be 101 percent of before-tax profit for country elevators (135 percent for country elevators with less than 10 employees) and 45 percent for small feed mills (167 percent for those with less than 10 employees). 26/ These percentages are much higher than for other segments of the industry.

The possibility that the proposed rule may constitute a disproportionately large burden on the profitability of country elevators and small feed mills is particularly worrisome because these segments of the industry may be least able to pass on the costs to others, such as consumers or farmers. This is because small country elevators and mills compete most directly with on-farm storage facilities, which are not covered by the proposed rule. To some extent, they also compete with larger elevators, which bear a smaller relative cost burden as a result of the rule, further limiting the ability of small facilities to pass on the costs of the rule. If a substantial part of the costs of the rule cannot be passed on, a likely result is that some additional small country elevators and mills will be forced to close.

26/ ADL, Vol. II, p. G-54.

OSHA has observed, and we agree, that for country elevators which either belong to cooperatives or are subsidiaries of larger firms, accounting measures of profit may be particularly poor measures of true profit. However, more than half the country elevators are owned by individual family corporations or partnerships and not by cooperatives or other firms. 27/

It is not apparent whether the limitations of the profit data would systematically bias the cost/profit ratio upward or downward. For example, while transfer pricing between subsidiaries of the same enterprise could artificially reallocate profits between them, we do not know whether this would have any systematic effect on country elevators and, if so, whether it would overstate or understate their profits. One factor, however, would be expected to overstate the profits of small facilities, and hence understate the financial burden on them. It is probable that a substantial number of small facilities are unincorporated enterprises. The net income of unincorporated enterprises overstates true profits because it includes a return to labor and management supplied by owners.

OSHA has observed that for country elevators and small feed mills, the annualized cost of the proposed rule would be only about one percent of revenues. This figure is not very reassuring. Most grain-handling facilities are low-value-added,

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27/ See the RIA, p. II-17. OSHA's claim that 95 percent were owned by cooperatives or other firms is not borne out by the RIA.

low-mark-up enterprises. (When an elevator sells grain it previously purchased, the value of that sale is counted as part of revenues.) This means that total revenues are very large compared to profits, labor costs, overhead costs, or almost anything else. When its cost is compared to total revenues, even a very onerous rule would be likely to appear insignificant. If all the costs of the rule could be passed forward to consumers or backward to farmers, it might be appropriate to use profit as a percentage of revenues to indicate the relative burden of the rule. However, country elevators are unlikely to be able to pass on a large fraction of their costs because their main competitors, on-farm elevators, are not covered by the proposed rule.

Another measure gives further indication that the proposed rule may place an undue financial burden on small facilities. According to the RIA (p. VIII-4), 76.3 percent of investment would be required for country elevators to comply with the proposed regulation if all facilities chose to meet the 1/8-inch action level standard. For small feed mills the corresponding figure is 37.5 percent. For other segments the corresponding percentage is 22 percent or less.

2. Feed Mills

The analysis in Section III.A indicated that hazards in feed mills are very low relative to large elevators. The RIA implies that for feed mills the costs of the proposed rule exceed the benefits.

Table 4 is derived from estimates in the RIA. We have made one adjustment to the benefits estimates in the RIA. Our estimates value reductions in fatality risk according to the conceptually superior "willingness-to-pay" approach, rather than the "human capital" approach. This increases estimated benefits. Two alternative cost estimates are presented, based on compliance with the dust control provision by alternative means: (1) the 1/8-inch dust action level or "thorough" housekeeping (for feed mills the compliance cost is virtually the same for these two, according to OSHA estimates) or (2) "brush-by" housekeeping.

The implication of Table IV is that the costs of the proposed rule greatly exceed the benefits for small feed mills, regardless of how compliance with the dust control provision is achieved. For large feed mills the benefits would be less than costs unless a substantial majority of the mills were able to comply with the dust control provision by means of "brush-by" housekeeping. If the benefit estimates were adjusted to correct for the upward biases identified in Part II above, it would be even less likely that benefits would exceed costs for large feed mills.

Table 4

ANNUAL BENEFITS AND COSTS OF
PROPOSED RULE FOR FEED MILLS (millions)

	Small Feed Mills	Large Feed Mills
Benefits	$9.7	$7.1
Costs		
(1) 1/8" action level or thorough housekeeping	21.5	24.0
(2) Brush-by housekeeping	12.5	2.9

Sources: RIA, pp. V-47, VI-20, VII-56, VII-70 and VII-71.

IV. Conclusion

Our analysis of OSHA's proposed grain handling rule leads to two major findings. First, the RIA overstates the likely benefits from the proposed rule by overstating the baseline risks and by making overly optimistic assumptions about the rule's effectiveness. Second, after reviewing the risks and costs of the rule for different segments of the grain handling industry, we conclude that the evidence does not support the need for this rule for segments other than large or high-throughput grain elevators. We have also identified four specific provisions which are in particular need of further examination--grain driers, grate openings, bin entry testing, and inside legs.

Mr. MILLER. Our letter, which was altogether on the record, clearly states the nature of our concerns. I will highlight only one of them to indicate that these concerns weren't trivial.

There are 16,000 grain handling facilities that would be covered by the OSHA proposal. About 10,000 of these are small country elevators. According to data supplied to us by OSHA, the cost of complying with the many safety and housekeeping responsibilities of their original proposal would have exceeded on average the profits of these small country elevators. OSHA data also indicated that the risks that OSHA sought to prevent—that we also believed were grossly overstated—were not high compared to the risks of the larger elevators. In many instances, what you had was a choice between having no elevator at all, and none of the service at all.

Following OSHA's proposal in January 1984, hearings were held in four cities, and over 4,000 comments were received by OSHA in response to their proposal. According to OSHA's description of the grain handling safety proposal in the August edition of the Regulatory Program of the United States, the agency intended to issue a final rule in December 1985. OSHA apparently has not been able to meet that timetable.

Mr. Chairman and members of the committee, I want to thank you for your interest in our efforts to improve the management of Federal regulations and information collection, and to reduce unjustified burdens on the American people. If you have any questions, Dr. Gramm and I will be pleased to respond to them.

Senator DURENBERGER. I thank you for the statement, and I suspect that we will have a lot of questions, which we will have to submit to both of you for the record.

First, let me ask a question that deals with asbestos abatement. In 1984, Congress passed the Asbestos in School Hazardous Abatement Act. In November of that year, according to documents filed in the courts by our next witness, Mr. Guttman, the EPA Director determined that EPA should proceed with rulemaking. According further to those documents, OMB used 12291 to pressure EPA to cover up the results of an EPA internal study which showed that less than 25 percent of the voluntary cleanup activities were done competently.

The cover up was then used to justify EPA's decision not to issue regulations.

Can you comment on that, in addition to the other comments that you had on asbestos?

Mr. MILLER. I have no knowledge of that. I will look into it. Perhaps Wendy does.

Ms. GRAMM. This all occurred before I was here, and I am not familiar with the asbestos abatement rule. But, with regard to EPA's proposed ban of asbestos products as I understand it, our only concern with the original EPA proposal was that they had not considered in their analysis the fact that OSHA, at that time, had a rulemaking underway, and in fact had proposed to lower their exposure limits. We believed that EPA should consider that fact in their rulemaking, in considering both the costs and the benefits, since a lot of the exposure for asbestos covered by the EPA proposal was in the occupational setting.

The other general concern that we had was that EPA had proposed just one alternative. In fact, what we had urged them to do was to consider different alternatives, and the cost of each of these alternatives. For example, we wanted EPA to consider whether or not substitutes would be available for some of the current uses of asbestos, such as brakes for automobiles.

There was no attempt by OMB to pressure EPA to cover up any discussion of asbestos practices. In fact, I understand that the study referred to in Senator Durenberger's question was not a formal "study," but rather the result of a show of hands by EPA's regional asbestos coordinators at a meeting in the spring of 1984. With regard to the many general allegations made by Mr. Guttman in his testimony, I would note that this matter is the subject of litigation currently pending in Federal court. As a result, it would not be appropriate to discuss these issues further at this time.

Senator DURENBERGER. Mr. Director, when you were here for the confirmation hearing, we dwelt for some period of time on drinking water standards. Within a very short period of time after your departure, the 40 RMCL's, which we had been waiting for, for a long, long time, appeared. That came after that hearing, and it came after a joint resolution passed through the House and the Senate of the United States, and after leadership letters begging for the release of the RMCL's. I just took it that it was sort of a fortuitous thing that you appeared here and that we were able to discuss it, and all of a sudden we had these recommended maximum contaminent levels.

What assurance can you give me that we don't have to have a hearing in the future on similar situations? What did you find that was unique about that case and that you have now remedied so it will never happen again, so we will never have to have another joint resolution of Congress?

Ms. GRAMM. Again, as I understand it, this went on before we came here. First, all of these rules have been cleared. Second, drinking water standards raise very complicated issues. The question that we asked EPA was that in a lot of cases there was a very, very low risk; yet EPA was proposing national standards that would cover some 60,000 drinking water authorities. In some cases, the chemical compounds to be regulated did not even appear in most drinking water systems. In other words, we sought more specific justification of the need to regulate in such sweeping terms.

If there was a problem with the levels of chemical compounds in some of the drinking water systems, they were very well known. A case that comes to my mind is the fluoride case. In most water systems, you have to add fluoride. Yet in a few cases, there may be excessive levels of fluoride, but these situations are well known. The regulatory question that we had was to what extent should EPA use national standards. Really, EPA needed to decide the priorities of how they were going to regulate and what standards they were going to use. In setting national policy, EPA had to make sure that it dealt with the most problematical areas and the most problematical compounds first of all.

Senator DURENBERGER. I have been on the EPA side of this now for my 5th, going on 6th year. I don't consider myself expert, but I have to be one of the most frustrated people in the place.

I just listened to the Director go through a statistical history, which was all very interesting, but not really very exciting, all important to the record.

Mr. MILLER. Some can tell them, and some can't, I guess.

Senator DURENBERGER. You have it. [General laughter.]

You are all we have, and you are in charge, so we have to deal with that.

I just want to ask a quick question, and my time is up here, and I will direct it to you, Wendy.

My impression is that the problem is not at the output end as much as it is in the preproposal stage. I heard the Director say that after 12291 came out, the President got the gang together down at the Cabinet room, and he said to the agency heads: I want you to follow this 12291 to the extent possible under the law. Where the law says to do it differently, you do it differently.

There was a clear message from the President of the United States to the agency heads that they had to follow 12291. Flowing from that, I take it, was a series of get-togethers at the preproposal stage for a lot of regulations. I wonder if that still goes on, and what is it that takes place?

What is the relationship between OMB and the agency heads at this preproposal stage that would lead them to approach the process differently from how they might approach it otherwise?

Ms. GRAMM. From my sense of being in OMB in just the past few months, a lot of different things happen. Sometimes rules come over that we haven't even seen at all. But there are cases, particularly for major rules, or for ones subject to deadlines, for which I encourage my staff to talk to the people at EPA. We are just as concerned as they are that they adhere to their statutory deadlines.

To the extent to which regulatory agencies keep us informed about what they are doing, and what they are proposing, we add our input where we can, and that is useful to both of us. Again, the extent of that communication is limited. We cannot do too much across all the Government, as we are a much smaller number of people.

Mr. MILLER. Could I add to that?

I think that most, if not all, of the EPA rules that we are talking about are the product of so-called informal rulemaking. In informal rulemakings there is, of course, a formal record, and certain rules about ex-parte contacts, and so forth. Typically, as an agency begins to develop a rule the first thing the agency wants is information, and agency officials will begin to talk with those who have information. Many times, those who have information are the same people who might be affected by the regulations.

So there is an ongoing process to develop a rule in which, under informal rulemaking, there is a great deal of informal discussion between the agency and outsiders. I would say, as a rule, OMB gets involved in the process at the very end, not at the beginning of the process.

Senator DURENBERGER. Thank you.

Carl.

Senator LEVIN. Thank you, Mr. Chairman.

In my opening statement, which I gave earlier, I indicated a growing frustration with the OMB role in rulemaking. I have been one who has supported executive oversight. I think that there is a useful management role to be played, providing the OMB acts as an adviser and not as a dictator.

The testimony that we have and that other hearings have elicited indicates a much stronger role for OMB than just an adviser. For instance, there was testimony at a House hearing where the former Chief of Staff for EPA, John Daniel, testified that when EPA went ahead and issued some regulations over OMB objections, he got a call from Jim Tozzi, who worked with that, Director of OIRA at that time, who said words to the effect, "There was a price to pay for doing what we had done and that we hadn't begun to pay."

During the confirmation hearing, Dr. Miller, I asked you the following questions:

> Senator LEVIN. Do you want the agencies to conform to OMB comments relative to their rules?
>
> Mr. MILLER. Yes; and if there is a difference that it be raised and worked out in some way.
>
> Senator LEVIN. But you want them to conform?
>
> Mr. MILLER. Yes.
>
> Senator LEVIN. That is the message you are trying to get to the agency; right?
>
> Mr. MILLER. Yes.
>
> Senator LEVIN. You don't consider them advisory only, those OMB comments, do you?
>
> Mr. MILLER. No. I anticipate or would anticipate that the agency heads would respond to them. Again, if they had a difference of opinion that they felt was sufficient to, in a time frame that was very short, they might make a decision differently. But I would anticipate and hope that the process would work where differences would be worked out.
>
> Senator LEVIN. I am not talking about responding to them. I am talking about complying with them. Is that what we are talking about?
>
> Mr. MILLER. Right.

It is a very different tone from the Attorney General's opinion in briefs that says, "OMB is advisory only." You want compliance, and most of the time you get it. As a matter of fact, at your confirmation hearing, you couldn't even identify any occasion where substantively the recommendations were ignored, but perhaps one.

I think that your own testimony at the confirmation hearing indicates a very different role for OMB than what the Attorney General says is constitutional.

I am troubled also by testimony that we received here today. You were not here to hear it, but I would like to comment on it. It has to do with the fact that OMB has attempted to hide its role.

I think that it is very damaging when we have people testify that when OMB made comments to OSHA on its grain elevator rules, those comments were written down by OMB, not typed up in any way. OSHA made handwritten notes, and then someone else came along and typed them up, and then was able to get them secretly to somebody in a men's room over at OSHA. These are substantive comments and we ought to get you a copy of them if you haven't seen them.

These are very substantive comments: "1/8th inch dust levels unsupported, and apparently arbitrary. The regulation appears that it would disproportionately affect small business." These are extremely substantive comments.

Then we have, according to the testimony, OSHA preparing a 27-page response to these comments, and it is told by OMB not to send it in writing, but to read the 27 pages over the phone. That is the testimony.

I am for executive oversight, because I want accountability, but this is not accountability. This is not "the buck stops here" at OMB, when we are really pressuring these rules the way we want them. It is "the buck stops there." We want to be the real decision point, but you can take the heat out there at the agency level. That is not what I call accountability.

I have been one who has been willing to support executive oversight, but not the way it is being handled. We have had discussions about this. My question is: You didn't hear the testimony today, but I want to relate right to it. Do you consider it appropriate for OMB personnel, if in fact they did this, to tell agency personnel, "Don't send us your comments on our OMB comments, read them to us over the telephone?"

Do you consider that an appropriate way to behave in the regulatory process?

Mr. MILLER. Let me, if I could, respond seriatim.

On the question of adviser, of course, an adviser hopes that the decisionmaker will conform to the advice delivered. That is not inconsistent with being an adviser. Of course, the advice is, in our judgment, whether the proposed regulation conforms with the President's regulatory principles set forth in his Executive order. Again, I think that that is a very legitimate type of advice to give.

The second point is that it is a very inefficient way to transmit information. Assuming that testimony were true, I would speculate that it is evidence of a paranoia that is beginning to develop over whether anything that anyone says might be discoverable, and held up in public light.

[The following information was subsequently received following the hearing:]

Dr. Miller was subsequently informed by OIRA that it did not ask for such a document either in writing or orally; and did not tell OSHA to read the 27-page document over the telephone, instead of sending it to OIRA in writing.

Mr. MILLER. The ordinary deliberative process of discussing sensitive issues needs certain protections. Just as when, Senator Levin, you talk with Senator Durenberger about a proposed bill, you don't necessarily want everything that you say held up to public scrutiny and thereby be characterized as a formal position that you once had. You want to be free to talk about alternatives, to play the devil's advocate, and to look at the whole scope of an activity, and its possible implications.

For example, I used to teach in universities, and used the Socratic method a lot. If transcripts of some of my classroom teachings had been made available to you, I am sure that you would have denounced me as a total incompetent because one way of ferreting out issues or causing students to think about issues is to state something obviously wrong.

There is, I think, a concern on the part of the people who engage in the deliberative process that what they say, or what they write down informally may be held up to public scrutiny in an unfair way—in an unfair way.

I have no reservations about your seeing almost anything that I do, provided I think that what is written is an appropriate and fair representation and the person on the other end doesn't mind its being shown.

Senator LEVIN. My time is up. OSHA didn't mind them being in writing, they put them in writing. It is OMB that said: "Oh, no, read them to us on the phone, don't send them to us."

Mr. MILLER. Assuming that is correct, I would say that it was an inappropriate mode of transmitting information.

Senator DURENBERGER. Senator Gore.

Mr. GORE. Thank you, Mr. Chairman.

I would like to welcome Dr. Miller, and particularly Dr. Gramm, and wish her well in her new assignment.

We have had a running debate on this, Dr. Miller, since well before you came into the Federal Government. You know that I totally disagree with your view of this. I think that the recent exchange in the court illustrates the constitutional problem that I have been raising since you began this exercise. The Justice Department is forced to try to deceive the court into believing that really OMB is not exercising any authority over these.

Mr. MILLER. Senator Gore, I take issue with that characterization.

Senator GORE. Let me finish my question, Dr. Miller, and then I will give you a chance to respond.

In my opinion, the Justice Department is forced to try to deceive the court into believing that the OMB doesn't really exercise any authority over the formulation of these regulations when, in fact, in your testimony at the confirmation hearing, in the evidence that I presented at the confirmation hearing, in the testimony of Mr. Daniel, a former Executive Assistant to the Director of EPA, and in testimony presented by numerous others, it is abundantly clear that OMB does seek to exercise authority over the formulation of these regulations.

Let me ask you if you would give your view of it, but let me ask you to be brief because I have several questions. Isn't it true that what the Justice Department said in their response to that law suit is simply not true?

Mr. MILLER. First of all, I want to respond to what I took issue with. Maybe I misheard you, and if I did, I apologize. What I heard you say is that the Justice Department had pressured me into essentially falsifying my views. That is totally untrue.

Senator GORE. I didn't say that. I said that they tried to deceive the court.

Mr. MILLER. I apologize, then. As to the question of the Justice representation, I think it is accurate, based on what I have read.

Senator GORE. Executive Order 12291 is just advisory, and all of these agencies need not really pay any attention to it. They can take it as friendly advice, and ignore it if they wish to. Is that correct?

Mr. MILLER. No; that is not an accurate representation of the Justice Department's brief.

Senator GORE. Do they have to do what you tell them or not?

Mr. MILLER. As a matter of law, agencies do not have to do what OMB tells them to do.

Senator GORE. Is it merely a coincidence that they always do?

Mr. MILLER. I doubt it.

Senator GORE. Why do they always do what you tell them?

Mr. MILLER. Because agencies are concerned as to whether they reflect the President's principles in their regulatory decisions, to the extent that they have the discretion under law.

Senator GORE. In some cases, they have been threatened if they don't do what you tell them.

Mr. MILLER. We have received over 12,000 draft rules. Have you ever been a kid on the schoolground, and have a young fellow get mad at you and say, "I am going to beat you up." That is sort of a natural reaction.

Senator GORE. I fail to see the relevance.

Mr. MILLER. The relevance is, if something does not necessarily go the way a Federal official would like it to go, sometimes they get angry about it.

Senator GORE. If one of them just happens to have control over the budget of the agency, that makes a difference, doesn't it?

Mr. MILLER. I think you read the example of Mr. Tozzi. Mr. Tozzi had no control whatsoever over the budget of the agency.

Senator DURENBERGER. Would you yield for just one second?

Senator GORE. Certainly.

Senator DURENBERGER. The school playground reminded me of something that is relevant, and that is a famous quotation from James C. Miller in 1981. It says, "You know, if you are the toughest kid on the block, most kids won't pick a fight with you. The Executive Order 12291 established things quite clearly."

Mr. MILLER. That is true.

Senator DURENBERGER. Do you still stand by that?

Mr. MILLER. Yes.

Senator DURENBERGER. Does that add a dimension to your response to the Senator's question?

Mr. MILLER. What it means is that——

Senator LEVIN. It is pretty clear.

Mr. MILLER. Let me put this in historical perspective. As you know, President Carter's Executive Order 12044 did not have very much effect. My judgment is that it didn't have much effect in part because the agencies really didn't take President Carter's regulatory review process very seriously. I wanted to get the attention of agencies and I think that I got it.

Senator GORE. In fact, the administration is speaking out of both sides of its mouth. The President and OMB tells the agencies in the text of the Executive order, "You have to do what OMB says." Then when that is challenged as unconstitutional, the Justice Department lawyers read the Constitution and they say, "Oh my God, this is unconstitutional. We will have to argue that these agencies are free to ignore the Executive order."

You have, out of one side of its mouth, the administration saying to the agencies, "You have to do it," and out of the other side of its mouth, they tell the court, "Oh no, they don't have to do it." It is deceitful.

Mr. **Miller**. That is your personal opinion, Senator Gore. It is not my reading of the original documents in which the Department of Justice's Office of Legal Counsel gave an opinion to the President that the Executive order was "acceptable as to form and legality."

Senator **Gore**. I am talking about what they said to the court.

Mr. **Miller**. Yes, but you are juxtaposing what Justice said to the President about the Executive order's legality with what Justice later said to the courts. I think that a panel of outstanding law school deans would not find the documents inconsistent.

Senator **Gore**. May I explore one other issue, Mr. Chairman?

Senator **Durenberger**. Yes.

Senator **Gore**. Thank you.

You said in your testimony just a moment ago that OMB concluded that the grain dust standard as submitted to OMB for review was deeply flawed because, for one thing, the risk was "grossly overstated." Do you think the risk to the three workers who were killed in Knoxville was grossly overstated?

Mr. **Miller**. That is not the appropriate use of the term risk. I don't know what you mean by the term risk when you see someone suffering an accident.

Senator **Gore**. They faced a risk when they walked into that grain elevator. The risk they faced did not have to be present when they walked into that grain elevator. That risk had been identified before they walked in, and a distinguished panel of scientists, the agency responsible for assessing that risk, and others had said, "We have to remove this risk. It's unreasonable. It can cause loss of life."

After that decision was made by OSHA, they submitted their assessment of the risk and their proposed remedy to OMB. OMB decided, in your view, that the risk was grossly overstated. While OMB held up the regulation, the risk continued. The measures to remove the risk were not allowed to be put into place because of OMB's interference.

Subsequent to OMB's interference, these three men walked into the grain elevator and faced that same risk, which should have been removed, and lost their lives as a result.

My question to you is, in retrospect, do you believe that the risk faced by those three workers, when they walked into that grain elevator, was grossly overstated by those who recommended the removal of that risk?

Mr. **Miller**. Senator Gore, I have had enough experience in some of the colloquies I have had with you to want to check out facts of the particular incident to which you referred before I think it would be appropriate to respond.

Senator **Gore**. Can you give me an example of where I have misstated the facts?

Mr. **Miller**. No. I simply do not know the situation to which you refer.

Senator **Gore**. Your statement implied that perhaps I have been a little fast and loose with the facts. Can you give me a single example of where that is the case?

Mr. MILLER. I apologize if you drew that conclusion; that was certainly not my intent.

Senator GORE. The Tennessee Department of Occupational Safety and Health described the risk faced by those workers when they walked into that grain elevator. They described the cause of the accident. They came to the conclusion that if the dust had been removed, as would have been required by the proposed regulation, then the risk would have been removed and these people would still be alive.

You just testified that the risk was grossly overstated. The question is a very simple one. Do you think that the risk that was faced by these workers as described by the analysis of this accident was grossly overstated or not?

Mr. MILLER. Senator Gore, you are shouting at me, and I don't think that that is conducive to a reasonable exchange of information.

Senator GORE. Answers are conducive to a reasonable exchange, and I am trying to get one.

Mr. MILLER. I will be happy to respond to you later.

Senator GORE. Can you respond now?

Mr. MILLER. I will respond to you later.

[Mr. Miller's written response, subsequent to the hearing follows:]

I stated at the hearing, Senator Gore used the term "risk" inappropriately. Risk is the possibility of suffering harm—not its actual occurrence. One cannot single out one accident after it has happened and say: "See the risks were understated." One must examine all the data. In 1984, a total of nine people, including the three in Knoxville, were killed in explosions. That is nine out of the 200,000 people working in grain handling facilities. This translates to a risk of fatalities of about 4.5 per 100,000 or one-half the average risk of fatality for the average job in the U.S.

The question about whether the Office of Information and Regulatory Affairs' filing to OSHA's public docket was incorrect in stating that "OSHA's analysis to date has substantially overstated the risks of fires, explosions, and other hazards in grain handling" can be answered by looking at what OSHA predicted would happen in the absence of a standard and what has actually happened. Based on data from 1976-82, OSHA predicted that 19 deaths per year would occur due to grain explosions. However, between 1983 and 1985, only 4.3 occurred annually, less than one quarter of the OSHA prediction. (In addition to the nine deaths that occurred in 1984, there were four in 1985 and zero in 1983). Even OIRA's estimate made in our filing in 1984 turned out to be too high. Based on data between 1978 and 1983, we predicted that on average 7 fatalities would occur annually due to explosions.

This is not the only example of the tendency in OSHA's Regulatory Impact Analysis to overestimate risks in the grain handling industry. Other examples are carefully explained in the original filing which OMB supplied to the committee.

There is no way of knowing whether the Knoxville explosion could have been prevented by more stringent OSHA standards. Even OSHA did not predict that all explosions would be eliminated by a new standard. We do know, however, that the fatality rate due to explosions has been dropping dramatically in this industry since the middle 70's. At that time several dramatic explosions induced the industry to find ways to reduce risks and the Departments of Labor and Agriculture stepped up enforcement of existing regulations.

Senator GORE. Can you respond now with a yes or no as to whether it was grossly overstated?

Mr. MILLER. No; I cannot.

Senator GORE. Why not?

Senator DURENBERGER. I think that he has indicated that he will respond at an appropriate time.

Senator **Gore**. Mr. Chairman, I have a followup question, so I would like to know what his answer is.

Senator **Durenberger**. He has indicated that you will get an answer.

Senator **Gore**. He is indicating that he is refusing to answer.

Who at OMB made the decision that the risk was grossly overstated? Which of your safety engineers, or occupational health specialists made this decision?

Mr. **Miller**. I do not know.

Senator **Gore**. Do you have any safety engineers or occupational health specialists at OMB?

Mr. **Miller**. I think that we have provided that information either to this committee or to some other. I will be glad to provide it again.

[The information referred to follows:]

OIRA Staff Qualifications*

Subject	Staff with Degrees		Staff with Prior Work Experience	
	#	%	#	%
Economics	23	43	29	55
Public Policy	20	38	37	70
Business/Finance	10	19	16	30
Science	8	15	14	26
Law	8	15	12	23
Statistics	7	13	22	42
Engineering	5	9	5	9
Health	1	2	13	25
Cost Benefit Analysis	-	-	24	45
Risk Assessment	-	-	14	26
Safety	-	-	12	23

*Total of 53 professionals, many of which hold various other degrees and have college teaching experience.

Senator GORE. I happen to know what the answer to that question is. The answer is "No."

Do you know who made that decision?

Mr. MILLER. I have answered you; no.

Senator GORE. It illuminates yet another problem with this whole procedure. The standard was devised by scientists, safety engineers, and occupational health specialists. It was designed in full and open public view, according to safeguards established by the Congress, with the National Academy of Sciences.

Then it goes over to OMB, and what happens, OMB gets a telephone call from the people who own the companies that are going to have to spend money to comply with the regulation. They are not health specialists, or health scientists, or engineers. They are looking at the bottom line, and they say to OMB, "Please don't let this regulation go through, it is going to hurt our bottom line on our annual report this year, and it is going to make us have to spend some money."

So OMB says, "We wouldn't want to do that." OMB tells OSHA, "Don't put out this regulation." It is really a travesty.

Ms. GRAMM. Senator Gore.

Senator GORE. Yes.

Ms. GRAMM. This happened before I was here, and I am not fully up on the details. We have provided you with the extensive filing that OMB submitted for inclusion in the OSHA public record. It is my understanding that one of the concerns that came over with the original proposal, which was identified in the OMB filing was that it proposed on the dust issue, which is the most controversial part of it, it proposed to impose as one option a one-eighth inch action dust level, when in fact where the real problem occurred was when the dust was circulated.

One of the things that was at issue was the opening up of alternatives to deal with the problem, alternatives to eliminate some of this layered dust, for example.

Again, this happened before we were here, however, the written description of our concerns and analysis is something that we have provided you for the record.

Senator GORE. I daresay that this wouldn't have happened if you had been in charge. I hope that that is the case. I know you personally, but I don't know what approach you are going to take to this job.

Just to review it just briefly, OMB recommended an alternative of having the company just certify that they had swept every so often, and that would be sufficient.

Ms. GRAMM. There is one thing that I would hope we could do. For example, the example that you brought up, Senator Levin, about one of my staffers asking an agency staffer just to read a document so that they wouldn't have anything written down—I wish that you would describe these events to us so that we can respond. I have never heard of cases like that.

Very often I hear allegations, and people will call me and say, "What have you done with that rule, and why are you holding it up?" We often do not have the rule over here for our review, so we couldn't possibly be holding it up. I would like to open that up—to hear the allegations that you hear, so that we can respond and open up communications.

Senator DURENBERGER. I think this interchange illustrates where we are trying to go. We have used history; we have used some background to try to clarify what Jim Miller meant when he said that 12291 is the tough kid on the block; and we are getting some questions on what the tough kid on the block looks like when explosions occur at grain elevators around the country, and so forth, and that is largely how it is being viewed here.

A large part of the question form my standpoint is: Where are we going from here? What we heard 5 months ago, Jim, was that we are going into the sunshine. We are going to get out into the open. We don't want to come back here in 6 months and have the Senator from Tennessee talking about businesses that make secret phone calls, or the Senator from Michigan talking about clandestine meetings in washrooms because everything is going to be out there in the open.

I understood you to indicate that you were going to be involved in this process of factfinding and the appropriateness of the procedure. Can you make a commitment here today that would give us some idea of how OMB intends to clarify the process, the exercise of 12291 as it affects agency rules? The time lines and that sort of thing?

Mr. MILLER. Let me say that it is with some distress that I appear here today without being able to give you a list of changes or modifications I would make. I surely had the best of intentions, but as soon as I got to OMB, we had something called Gramm-Rudman-Hollings come along and my days have been quite long and my nights quite short since then.

We have tossed this around and discussed it in some detail. Basically, I will tell you where I am coming from. Obviously, there is a need generally for openness and accountability for Government agencies and Government officials. Second, there is a need to protect the deliberative process. Where you draw the line between those two is an ever vexing problem.

Obviously, too, the discussions that I have heard you make here in this room, communications to me by some others, and some writings that I have read—all pose to me that there is a great deal of suspicion about the role of OMB in this process. This suspicion suggests to me a need to move the line, as between protecting the deliberative process and affording accountability and the openness in government agencies, more toward openness.

Just how best to fashion a set of changes or modifications is something that I have not concluded in my own mind, and that Wendy has not concluded in her own mind and nailed down. We hope to be able to review the information here.

One of the frustrating things to be is that there is a great deal of misinformation about OMB's process. Like Wendy, I am forever being accosted at some cocktail party by some Government official who says, "Please do me a favor, let go of our regulation," or something, and I find out that there is no such regulation at OMB. Or you find someone on the outside who says, "You know, it would make a big differnece to us if your regulation were approved, or if there were at least a reduction in the uncertainty. The agency has told us that you have the regulation and won't clear it." I will go back and find out that we don't have the regulation.

If nothing else, it would probably be a good idea for us at least to have as a ready piece of information what is at OMB for review and what is not.

Senator DURENBERGER. I think the sooner the better because each of us has these experiences. Mine have been related to regulations on asbestos, safe drinking water, and so forth, where in fact it has been the fault of OMB, or the groundwork that OMB laid while playing the tough kid on the block and some agency head has not gotten a different message.

I know that you are bogged down with Gramm-Rudman-Hollings, and you will be for some time; but you have a very good Gramm on your right. Just let her know, and don't wait for all of this to be summarized someplace. She is a lot smarter than a lot of the rest of us, and she has been hearing about these issues for a long time. Perhaps you could encourage her to start charting some course and tell us in the next couple of months that some more definitive word has gone out to the agency heads. We will hear from Lee Thomas at EPA and the people at OSHA that, yes, things may be different. It will be one way for us to know that something different is happening.

Mr. MILLER. I would draw a very distinct line between these kinds of procedural changes and the substance of the Executive order itself. I truly believe that the review process and both Executive orders 12291 and 12498 are vital to making sense out of the administration's whole regulatory program.

Senator DURENBERGER. Does either of you have additional questions?

Senator LEVIN. Just a few questions or comments, if I could, Mr. Chairman.

Basically, the public confidence, including the confidence of Congress, in OMB, the administration, and this Executive order has been undermined. We heard for 5 years, frankly, that we have to somehow or other draw a line betweeen the need for accountability and public disclosure on the one hand, and the need for interagency consideration on the other, but we have not seen the resolution of this inside the OMB.

We have not seen a resolution inside Congress either, may I say, and it is a lot more complicated. We have not seen your resolution inside the OMB. Getting 535 people to agree on something is very difficult, and a lot more difficult than getting you to act in this area.

What we continue to get is testimony, allegations of serious violations of the accountability that is required in any regulatory process.

Ms. Gramm, you say that you are amazed if, in fact, an OMB person told an OSHA person, "Don't give us your comments on our comments in writing. Don't do that. Give us those 27 pages of comments over the phone." If you are really amazed, we can cut this knot really easily. You give instructions to your people to solicit responses to your comments in writing. You give instructions to your people to make your comments in writing. Can we count on you to do that?

Ms. GRAMM. Let me just address it from a managerial point of view. Very often we will review some studies that have been presented to us, and we will sit down and give comments on them. To the extent of having everybody write it down, to the extent that comments are verbal, I think that that is a very efficient way of communicating. Having to commit all conversations to a memo would, I think, turn us all into one vast paperwork machine.

Senator LEVIN. Would you at least tell other agencies that you would welcome their comments on your comments in writing?

Ms. GRAMM. Of course.

Senator LEVIN. You would do that.

Ms. GRAMM. Certainly. I would be delighted to have them respond to our written comments in writing.

Senator LEVIN. That is a minor step forward right there. If we could get that statement out of OMB to all of the other agencies, "We welcome your comments on our comments in writing," that would be a plus and a very big change from what the understanding is out there in the agencies now.

Dr. Miller, I have to make one more comment about your statement that you don't see any inconsistency between your assessment of that Executive order and what the Justice Department says it means. I just want to read this one more time, because I really think that you are trying to have it both ways, and you can't. You can't have it both ways. The public won't let you, and we are not going to let you for very long.

The Justice Department says, and they are accurate, that your role is advisory only. That is true, your role is advisory only. At best, that is what it should be under the law and under the Constitution.

Then when I asked you this question at your confirmation hearing,

> You don't consider them advisory only, these OMB comments, do you, Mr. Miller?

Your answer,

> No, I anticipate and would anticipate that the agency heads would respond to them.
>
> Senator LEVIN. I am not talking about responding to them, I am talking about complying with them. Is that what we are talking about?
>
> Mr. MILLER. Right.

You know, Jim, you are a pretty straightforward guy.

Senator DURENBERGER. He is also getting hungry.

Senator LEVIN. You are a straightforward, hungry guy. I like to think, whether I agree or disagree with you, we really have it straight. It is not straight, frankly, for the OMB to be saying, "We want them to conform to our comments. We don't consider our comments advisory only," which is what you told me at your confirmation hearing, and which is what other witnesses have told us, which this whole secrecy thing, to me, supports. In any event, it is your testimony at your own confirmation hearing which makes it clear, you don't consider these comments advisory only, you said so. You want them to conform, and you said so:

That is the message that you are trying to get?

Mr. MILLER. Yes.

That is totally different than what our Attorney General is telling a court, "These are advisory only. OMB is only giving this advice." Give it to us straight.

Mr. MILLER. Let me give it to you straight. I am not the most articulate guy in the world. I have a tape of that testimony. As I recollect what was going through my mind when you asked, "Are they advisory?", I think the question I thought I was being asked was, "Do you mean for them to dismiss them out of hand, or to pay no attention to them, to pay little attention to them?" The answer is clearly "No."

Senator LEVIN. This is the transcript from the hearing, and I don't know about your tape. If your tape shows different answers from this, then I think that we ought to get your tape and correct this official transcript, because that is the official transcript of this committee.

Mr. MILLER. In the context of the colloquy, which we had—which was a quite lengthy one as I recollect—you just quoted there, "You don't mean for them to disregard them," or something like that. If you could read back to me what it was that triggered my recollection it would help me understand the question you were asking me.

Senator LEVIN. The advisory question came before the "You don't intend for them to disregard."

Mr. MILLER. Again, it was a long colloquy. In any event, if I communicated something that I didn't mean, then I welcome this opportunity to correct it.

Senator LEVIN. It is not just that, frankly, it is just witness after witness testifying to the pressure of OMB on these agencies to comply with your comments. We have all kinds of testimony in all kinds of hearings to that effect, and that is the proof of the pudding right there.

We see what happens to the draft that goes to the OMB. We have discovery in court, but we can't get these drafts yet because the law hasn't been passed, and you have not on your own initiative put our law into effect. We ought to get the drafts of regulations that go to you, and we ought to get the final proposed regulation,[1] and compare them, and get the agency to say why they made the changes. That is what our bill does, in part. You can do that unilaterally tomorrow. You don't have to wait for a law. Tomorrow you can unilaterally say, "By God, drafts which come to us must be put into the rulemaking file. By God, yes, the agency should say why they made those changes, and whether the OMB comments were the reason for them." Otherwise, you don't have accountability here, you have ducking. You have ducking.

The buck doesn't stop at the White House, which is what you say you want, you want the buck to stop here. You want the White House to manage this process. But then when it comes down to the film, when you see what happens if you don't have an eighth of an inch standard and sweeping, you have got to be able to say, yes, you will take that risk if that is your judgment. You can't duck it and say, "That is OSHA, they did that on their own. Our comment was advisory only." You can't have it both ways. You can't have it both ways. If you want to impose that, if you want to cajole agencies and pressure them, then you have to accept that.

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[1] See p. 346.

Senator DURENBERGER. Point well made. We have about 5 minutes left in this part of the hearing, and then we will have to excuse the Director.

Mr. MILLER. I just want to say, Senator, that I don't mean in any way to minimize the importance of the OMB reviews, or to suggest for one moment that the agencies don't or shouldn't take our OMB reviews very, very seriously. I think that what I was trying to do was to reconcile what you implied or meant to say—namely, that there was a gross inconsistency between my answer in the confirmation hearings and what the Department of Justice has said in court. I don't think so. I will be glad to look at that again to see; if there is, I will tell you. I believe, however, that my written testimony discusses this issue in extensive detail.

Senator DURENBERGER. Senator Gore.

Senator GORE. Thank you very much, Mr. Chairman.

Dr. Miller, I would like to return to the grain dust standard.

When OMB got the proposed regulation from OSHA, people at OMB met with people from the industry that was affected; correct?

Mr. MILLER. I do not know.

Senator GORE. Mr. Chairman, I would like to insert in the record at this time letters from several industry groups thanking OMB for its helpfulness on this regulation, and thanking them for meeting with the industry during its review of the OSHA regulations.

Senator DURENBERGER. What is the date on these?

Senator GORE. June 23, 1983, or thereabouts, or July 1983, and August 1983.

[The letters referred to follow:]

from OMB files

NATIONAL
GRAIN & FEED
ASSOCIATION

Office of the
Executive Vice President
Alvin E. Oliver

June 23, 1983

Mr. Robert Bedell
Deputy Administrator, Office of
Information and Regulatory Affairs
Office of Management and Budget
3236 New Executive Office Bldg.
Washington, DC 20503

[illegible]

Dear Mr. Bedell:

Thank you for meeting with Marc Fleischaker, Bill Keating and me to discuss grain elevator safety. As requested, I am enclosing copies of our comments on the two preliminary OSHA proposals.

James E. Maness, Director of Engineering Services and Mark G. Goedde, Staff Engineer will be happy to meet with you when you return, to discuss the results and conclusions of our research on fires and explosions.

Sincerely yours,

Alvin E. Oliver

Alvin E. Oliver
Executive Vice President

AEO:lmw
Encls.
cc Marc Fleischaker

Post Office Box 28328 · Washington, D.C. 20005 · Telephone 202/783-2024

AFMA

July 19, 1983

Mr. John Morrall
Office of Management and Budget
Room 3019
New Executive Office Bldg.
726 Jackson Pl.
Washington, DC 20503

Re: OSHA Grain Handling Standard

Dear Mr. Morrall:

On behalf of the American Feed Manufacturers Association, we would like to thank you for meeting with us on May 26, 1982 to discuss OSHA's draft Grain Handling Facilities proposal. At this time we would like to briefly reiterate some of our major concerns regarding the Grain Handling Facilities proposal (second draft) and offer some rough economic data regarding compliance with the second draft of the proposal for the livestock feed manufacturing industry.

AFMA is the national trade association of livestock and poultry feed manufacturers. AFMA members manufacture 70% of the primary formula feed sold in the United States. The concerns discussed here are the result of a comprehensive study of the second draft by an industry-wide committee of safety, health, production, and engineering experts. The economic data provided is from one company whose engineers calculated the approximate cost for a typical plant.

The American Feed Manufacturers Association is generally concerned with the scope of the proposed Grain Handling Facilities Regulation. It is clear and apparent that the specific reason for promulgating this regulation is to reduce the number of grain explosions and fires. While the intent of such a regulation is certainly noble, the desired results may not be achieved by the proposal. Moreover, by applying the proposed rule to all grain handlers, including further processors, there will be a myriad of unintended costs with few, if any, countervailing benefits.

Feed manufacturers are not grain elevators and belong in a process industry group along with soybean processing, corn milling, etc. While the second draft of the proposed regulation generally performance language approach to the regulatory scheme, it is the opinion of the American Feed Manufacturers Association that a vertical standard for all grain handling facilities including the process industries is not supported by the evidence.

N FEED MANUFACTURERS ASSOCIATION, INC. • 1701 N. FT. MYER DRIVE • ARLINGTON, VA 22209 • TELE 70

There are numerous differences between process industries such as feed manufacturers and grain elevators. Feed manufacturers have a wide variety of feed ingredients of which raw bulk grain is only a small part of the total ingredient usage. Many of our ingredients such as calcium carbonate and dicalcium phosphate are inert ingredients frequently used to retard fires. Also most feed manufacturers use some liquid in the process which further reduces the chance of explosions or fires. Another major difference between feed manufacturers and grain elevators is the sheer volume of product and speed the product is moved. Typically, feed mill capacity is less than a thousand bushels per hour whereas most grain elevators have a capacity well in excess of thousands of bushels per hour. The feed manufacturers are also regulated by the Food and Drug Administration and must comply with the Good Manufacturing Practices (GMP) provided for in 21 CFR 225 provisions of the GMP's require a facility to have and maintain a housekeeping program. Certainly, if the feed plants must be maintained in an orderly condition for the Food and Drug Administration, they would be clean enough to satisfy the OSHA requirements without having specific vertical standards to cover housekeeping, etc.

The attached cost estimates are provided by one feed manufacturer who estimated the cost required to comply with the requirements of the second draft for a typical plant. Certain facilities would have a much higher cost and some facilities may already have some of the equipment in place reducing the entire cost.

Section G, Entry Into Bins, Silos, and Tanks, requires an employer to test for combustible gases, vapors, and toxic agents as well as oxygen. As shown on the attached, the costs of an oxygen tester is catalog priced at $695.00. A tester for toxic agents cannot be estimated as the number of potential toxic agents is too numerous and several testers may be required under the draft proposal. The proposal also requires a forced air blower to be available. The estimated cost - $2,000.00. A self-contained breathing apparatus is catalog priced at $960.00. A manual hoist with harness is $2,500.00 making the total bin and tank entry cost per facility over $6,000.00. Section G(4) requires employers to have rescue equipment available which would increase the cost by at least $1,500.00 per facility.

Section K, Filter Collectors, requires that all fabric dust filter collectors be equipped with a monitoring device. This device approximate cost of $1,500.00 per filter collector. As defined in the second draft of the proposed regulation, there is no distinction between powered central filter collectors and simple fabric dust collectors. Currently, many feed plants use a simple fabric dust filter on the vents of each bin to prevent dust from escaping. The collector is a simple fabric with no power unit and is a relatively inexpensive piece of equipment. Should all fabric dust filter collectors require a monitoring device which costs $1,500.00, the entire cost of this provision per plant would be enormous as many plants would have ten, fifteen, or more dust filters of this type running the cost $20,000.00 per facility or more.

Section K 2 (i) requires that new filter collectors located inside the facility must be protected by an explosion suppression system. This fire suppression system would probably cost in excess of $10,000.00 per unit.

K 2 (iii) requires the construction of a wall with at least a one hour fire rating. It is impossible to estimate the cost of this provision because there is no typical dimension for this kind of wall. While it is clear the agency prefers new facilities to locate the filter collectors outside the facility, in process industries such as feed manufacturing it is often impractical to locate the collectors outside because they are small collectors used to keep a mixing room or process room totally dust free for more efficient operation of the process control equipment.

Section M, Grain Stream Processing Equipment, requires the employer to install a scalper or a cleaner and a magnet system to remove ferrous metal from incoming grain. The scalper or cleaner to remove the foreign materials would cost from $25,000 to $100,000 per facility depending on the size and installation requirements. Electro-magnets for ferrous metals cost $10,000 to $25,000 and standard magnets cost from $2,000 to $10,000 depending on the installation and size.

AFMA appreciates this opportunity to provide input to the Office of Management and Budget regarding the draft proposal of OSHA's Grain Handling Facilities Regulation. Should further data be of benefit to you, we will be happy to provide it or to sit down and discuss the specifics of our submission.

Sincerely,

Jim Amidon

James L. Amidon
AFMA Safety Committee Chairman
Central Soya Company, Inc.

David A. Bossman
Director, Production
AFMA

Attachment

ROUGH ESTIMATE OF COSTS ASSOCIATED WITH OSHA's PROPOSED GRAIN HANDLING FACILITIES REGULATION

SECOND DRAFT

July 11, 1983

(G) Bin and Tank Entry

Oxygen testor		$ 695
Toxic Agents Tester		Unknown
Forced Air Blower	(est)	2,000
Self-contained Breathing App.		960
Harness		65
Lanyard		15
Hoist; manual		2,420
air		4,850

Rescue:

Resuscitation	600
Harness	65
Lanyard	15
Stokes Basket	282
Bridle	69
Portable lowering mechanism	631

(K) Filter Collectors

Monitoring Device	1,500
Fire Suppression	Thousands - 10?

(M) Grain Stream Processing Equip:

Scalper-Cleaner	25,000 to 100,000
Magnet; Electro	10,000 to 25,000
Standard	2,000 to 10,000

Millers' National Federation

600 Maryland Avenue, S.W., Suite 305
Washington, D.C. 20024 202-484-2200

May 20, 1983

Mr. Christopher DeMuth
Administrator for Information and Regulatory Manager
Office of Information and Regulatory Affairs 246
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503

SUBJECT: OSHA Grain Handling Standard

Dear Mr. DeMuth:

During the process of writing the proposed Occupational Safety and Health Administration (OSHA) Grain Handling Standard, affected industries were asked to comment on the draft proposals. The Millers' National Federation took advantage of the opportunity to supply comments. OSHA has ignored our comments in preparing the draft for OMB's review. A copy of the Federation's comments to OSHA is attached.

The Federation believes the proposed standard should only apply to grain handling areas and not processing areas of a flour milling facility. OSHA has refused to consider this change even though they have admitted their decision is based on "not very good data" and "if we were writing a final rule we probably wouldn't include them." This OSHA decision is a classic example of the old OSHA thinking, the more people covered in a standard the better regardless of the benefit or cost. We believe this decision is inconsistent with the goals of the Reagan Administration.

Sincerely,

Tom Klevay
Tom Klevay
Director of Technical Affairs

Attachment

TK:cag

National Association of the Flour Milling Industry

Millers' National Federation
600 Maryland Avenue, S.W., Suite 305
Washington, D.C. 20024 202-484-2200

August 12, 1983

Ms. Nancy Whentzler
Office of Management and Budget
New Executive Office Building
726 Jackson Place, N.W.
Room 3208
Washington, D. C.

Subject: OSHA Grain Handling Standard

Dear Ms. Whentzler:

Here is a copy of the comments submitted by the Millers' National Federation to OSHA's grain handling standard. OSHA has ignored our comments in preparing the draft standard for OMB's review.

As part of this rulemaking OSHA prepared a report entitled "Selected Occupational Fatalities Related to Grain Handling as Found in Reports of OSHA Fatality/Catastrophe Investigations." This report is based on the years 1977-1981. It identifies 126 fatalities. Not one of these fatalities occurred in a flour mill.

We asked OSHA to supply us information which they felt justified including flour mills in the standard. They sent us a report entitled "Literature Investigation of the Dust Explosion Danger in Industries Storing and Processing Cereals and Flour." This report appears to have been prepared for the Dutch Commodity Board. According to this report, 14 explosions in flour mills occurred during the period 1949-1974. Two of these were in the U.S. (1949, 1956). It is hard to believe that anyone, even OSHA, would suggest this data as justification. A copy of the above-mentioned report is enclosed.

If you have any question on the milling industry's position on this standard, please phone.

Sincerely,

Thomas J. Klevay
Director of Technical Affairs

Enclosures
TJK:lar

National Association of the Flour Milling Industry

Mr. MILLER. I would have no firsthand knowledge of this; I wasn't there.

Senator DURENBERGER. Without objection, they will be made part of the record.

Senator GORE. Thank you very much.

Do you know whether or not the OMB met with representatives of the other side of the argument?

Mr. MILLER. I do not know.

Senator GORE. Did you know that we were going to explore this particular regulation at this hearing?

Mr. MILLER. No. My preparation for the hearing, as I would assume would be understandable, was very short, given the other matters that take up my time right now.

Senator GORE. I understand that.

Dr. Gramm, have you reviewed this particular regulation?

Ms. GRAMM. That occurred before I was here, but I know a little bit about it.

Senator GORE. My information is that OMB only met with representatives from one side of the argument. They met with the industry, and asked the industry for its comments. The industry replied, "This is going to cost us too much money. We don't want to comply with it." They didn't meet with the other side.

Ms. GRAMM. Does it mean that OMB didn't get the information reflecting both sides of the issue, then?

Senator GORE. It means that one side had special and privileged access in its effort to change OMB's mind, and because OMB's mind determines the outcome of the matter, then only one side of the argument had special access to the one mechanism that truly controlled the outcome.

Ms. GRAMM. It is my understanding that the number of alternatives that were included in the NPRM were expanded because of OMB interest in it. In fact, expanding the alternatives to be considered allowed more comment, more sunshine into the rulemaking process rather than just having one alternative proposed.

Senator GORE. The phrase, "the number of alternatives," conjures up something——

Ms. GRAMM. NPRM has gone out for public comment.

Senator GORE. They were loopholes instead of alternatives.

Ms. GRAMM. The alternatives are to be addressed in the public comment period. If they turn out to be undesirable loopholes, then presumably that would be addressed so that when the final rule comes out there wouldn't be undesirable loopholes at all. Again, we have not looked at the final rule.

Senator GORE. There isn't a final rule.

Ms. GRAMM. That is right, it hasn't been completed yet.

Senator GORE. Sixteen months after these deaths in Tennessee, we still don't have a standard.

Ms. GRAMM. OSHA has to take these comments, I understand that they received over 4,000 comments. OSHA has to take the comments and review them, because they are now part of the agency's rulemaking record. We have not received the final rule yet, and we have not seen the results of their analysis. It will be forthcoming as soon as they are ready.

At this point, I don't think that OMB is holding things up. I think perhaps you should ask OSHA about it.

Senator **Gore**. The word I get is that the OSHA people decided, or some of them decided, that after OMB gutted the proposed regulation there remains a question of whether there is any point to it, if 10,400 of the 11,000 sites would be exempted under the version given by OMB.

Let me ask you another question here. My understanding is that OMB met with only one side, and OMB calculated the cost of the proposed regulation. Did OMB calculate the benefits of the proposed regulation?

Mr. **Miller**. Using OSHA data, OMB provided a comparison of the relative risks in the affected industries.

Senator **Durenberger**. Dr. Gramm, do you know?

Ms. **Gramm**. The comparison is provided in the OMB filing which has been submitted to you.

Senator **Durenberger**. Can you provide that for the record?

Ms. **Gramm**. Dr. Miller already provided that for the record.

Senator **Gore**. Mr. Miller designed the whole system. While you presume that they did calculate the benefits, that would not be my presumption at all. I presume that they did not calculate the benefits.

I would like to provide for the record of this hearing, Mr. Chairman, the analysis forms used by OMB in looking at the costs and benefits of proposed regulations submitted to it, and you will see from these forms, Mr. Chairman, that the forms have several spaces for the costs, annual recurring costs, one-time investment costs, but nowhere is there any place to note the benefits of the proposed regulation.

It is really, in my view, a complete sham. OMB talk to one side, calculates the costs, ignore the benefits, directs the outcome, and then pretends that its role is advisory only.

Senator **Durenberger**. Without objection, I will accept that for the record. And because I have questions on that subject, I will also use that form with those questions on cost/benefit analysis for the Director and for Dr. Gramm. Then you can frame your responses prospectively as well as retrospectively, so that we can find out whether what the Senator is complaining about is the way you are still planning to run the process.

Mr. **Miller**. Mr. Chairman, if I could just say something.

Senator **Durenberger**. This is going to be in conclusion because I am trying to get you back to your 12:30 lunch.

Mr. **Miller**. Mr. Chairman, if the agency did not estimate the benefits as well as the costs, then it was not following the directions that I promulgated to the agencies when I was the Administrator of the Office of Information and Regulatory Affairs.

Senator **Gore**. Mr. Chairman, 30 more seconds.

Senator **Durenberger**. Thirty seconds.

Senator **Gore**. Mr. Miller commented on the list of 150 regulations which I inserted in the record at the time of his confirmation hearing. Indeed, this list of 150 regulations shows the lengthy delays caused by the OMB review process. In response, Mr. Miller pointed out that this does not include the length of time consumed by agencies after they receive OMB's comments and, therefore, perhaps OMB is not responsible for all of the delay between the date submitted to OMB and the date published in the Federal Register.

I want to say, for the record, that I don't think that rebuttal is really pertinent for this reason: After an agency receives comments, then they have to change all of the regulation to conform with the comments and in many cases they are instructed to call back to OMB and get a checkoff on each one of the changes as they are made. In some cases, the changes required by OMB are so dramatic that the agency sometimes just throws up its hands and decides that this really is not worth it anymore.

Senator DURENBERGER. Somehow we have to bring this to an end.

Mr. MILLER. The data we gave you reflects the final OMB clearance. After the final OMB clearance, agencies make no more substantive changes.

Senator DURENBERGER. I think we know from this conversation that this is the beginning of our relationship and not the end of our relationship on this issue. I am grateful to you, on this day in particular, for taking as much time as you have, both of you. We will see you again, and I thank you for being here.

[Prepared statement of Mr. Miller follows:]

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

PREPARED WRITTEN STATEMENT
of
JAMES C. MILLER III
DIRECTOR
OFFICE OF MANAGEMENT AND BUDGET
before the
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
on
EXECUTIVE REGULATORY OVERSIGHT
JANUARY 28, 1986

Chairman Durenberger and Members of the Subcommittee: I appreciate the opportunity to discuss with you regulatory oversight as carried out by the Executive branch. I will first describe the background of our efforts, including various legislative initiatives and then Executive Order Nos. 12291 and 12498 and their implementation. I will also describe our policies concerning our disclosure of information about the rules that we review, and the length of our reviews.

I was the first Administrator of the Office of Information and Regulatory Affairs (OIRA). I am proud of the work that that Office did then and has done since under the leadership of my successors as Administrator -- Christopher DeMuth, Doug Ginsburg, and, now, Wendy Gramm. I think that the Office is now an important part of how the Executive branch operates.

I. Major Functions of OIRA

Before I discuss our regulatory review activities, I must point out briefly that these regulatory activities are just some of the functions that the Office of Information and Regulatory Affairs (OIRA) carries out.[1]

Paperwork Reduction. Under the Paperwork Reduction Act of 1980,[2] OIRA reviews and approves or disapproves all proposed information collections of the Executive branch agencies, including the so-called "independent regulatory agencies." OMB has been approving or disapproving proposed agency information collections for over 43 years, initially under the Federal Reports Act of 1942.[3]

Each year, OIRA reviews an average of 4,000 proposed information collections, many of which are recordkeeping or reporting requirements contained in or mandated by agency regulations. Since 1981, working with the Departments and agencies, we have reduced the paperwork burden imposed on the public by over 500,000,000 hours annually. From 1980 to 1983, we reduced the burden known to exist in 1980 by almost 33%. In 1984, paperwork burden was reduced by an additional 4.3%; and in 1985, we estimate the burden will be reduced by another 3.1%.[4]

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[1] We described these other OIRA functions in detail in our Fourth Annual Report Under the Paperwork Reduction Act of 1980, Managing Federal Information Resources (September 1985).

[2] P.L. 96-511 (December 11, 1980), 44 U.S.C. Chapter 35.

[3] P.L. 77-831 (December 24, 1942). "[T]he Director [of the Bureau of the Budget] is authorized within his discretion to make a determination as to whether or not the collection of any information by any Federal agency is necessary for the proper performance of the functions of such agency or for any other proper purpose. . . . To the extent, if any, that the Director determines that the collection of such information by such agency is unnecessary, either because it is not needed for the proper performance of the functions of such agency or because it can be obtained from another Federal agency or for any other reason, such agency shall not thereafter engage in the collection of such information." § 2(d).

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[4] Specific examples of major paperwork reductions that we have achieved are:

* Eliminating line items, streamlining formats, and discontinuing some forms and schedules required by the Internal Revenue Service (a reduction of 88 million burden hours a year);

* Eliminating detailed lending policies and accounting procedures imposed by the National Credit Union Administration on predominantly small local credit unions (a reduction of 67 million burden hours a year);

* Replacing the Federal Communications Commission's burdensome Program Log requirements for noncommercial radio broadcasters with a much less burdensome requirement that stations maintain a quarterly issues/program list (a reduction of 4.8 million burden hours a year);

* Developing a Uniform Medical Claims and Billing form for the Department of Health and Human Services (HHS) which replaced separate and varying Medicare, Medicaid and private third-party payor forms (a reduction of 10 million burden hours a year);

* Eliminating detailed regulations in the Department of Agriculture's school lunch and breakfast programs to simplify computations of reimbursement payments and to eliminate the Annual Report of Revenue and Cost (a reduction of 21 million burden hours a year); and

* Eliminating the Comprehensive Annual Services Plan in HHS' social services program; this action was one of a series of actions implementing the block grant concept, which sought to give states maximum flexibility to administer Federal grants

(Footnote continued)

Information Policy. OIRA establishes government-wide policies for the management of information systems and technology.[5] Under various authorities, OMB has been establishing these government-wide policies since before 1960.

Beginning in 1983, and annually since, with the assistance of the General Services Administration and the Department of Commerce, we have issued five-year plans for automatic data processing and telecommunications activities of Federal agencies.[6] As part of a triennial review of agency management activities carried out with GSA, we have identified eight major information management systems[7] that, because of their size of investment or the precedent-setting nature of proposed changes to them, OMB will review more intensively. OIRA recently issued a

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[4] (continued)
(a reduction of 5 million burden hours a year).

[5] See, e.g., 44 U.S.C. 3504(e) and (g), 44 U.S.C. 3513, the Brooks Act (P.L. 89-306 (October 30, 1965), 40 U.S.C. 759), and Executive Order No. 12046, March 27, 1978 (43 Fed. Reg. 13349).

[6] In FY 1986, we estimate that agencies will spend more than $15 billion for general purpose computers and telecommunications activities, and operate more than 17,000 medium and large scale computers.

[7] The eight systems are (1) the Department of Defense Tri-Service Medical Information System (TRIMIS), (2) the 1990 Census System, (3) the Patent and Trademark System, (4) the Internal Revenue Service Tax System Redesign (TSR), (5) the Department of Energy Laboratory System, (6) the Federal Aviation Administration En-route Air Traffic Control System, (7) the Department of Agriculture farm service systems, and (8) the Social Security Modernization Program.

Circular that combines and revises several policy OMB Circulars into a single, updated policy document for information resources management.[8] OMB is also establishing an information technology advisory committee to help us identify opportunities for the modernization of governmental information systems and to find and remove policy, regulatory, and legislative impediments to the most efficient use of information technology.

Statistical Policy. OIRA reviews Federal statistical activities as required by the Paperwork Reduction Act.[9] OMB has carried out government-wide statistical policy functions since before 1940.

As part of our statistical responsibility, we review proposed statistical surveys and studies to ensure that they produce data useful for their intended purposes, and that they adequately support agency risk assessments and other regulatory decisions. OIRA is working with seven agencies on an evaluation of their business survey methods to evaluate respondent burden and the quality of data received, and we are revising the Standard Industrial Classification. Each year we analyze the "statistical budgets" of some 70 Federal agencies and prepare a public report on them. The 1985 report on Federal statistics discussed the role of the States in the production and financing of Federal statistics.

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[8] OMB Circular A-130 entitled, "Management of Federal Information Resources," issued on December 12, 1985 (50 Fed. Reg. 52730, December 24, 1985).

[9] 44 U.S.C. 3504(d). See also 31 U.S.C. 1104(d); Executive Order No. 10253, June 11, 1951 (16 Fed. Reg. 5605), as amended; 22 U.S.C. 286f; and Executive Order No. 10033, February 8, 1949 (14 Fed. Reg. 561), as amended.

Regulatory Policy and Executive Review. OIRA reviews the regulatory actions of Executive agencies.[10] In order to determine consistency with the President's regulatory principles, OIRA has, as of December 31, 1985, reviewed under Executive Order No. 12291 over 5,100 proposed agency rules and over 7,000 final agency rules -- a total of over 12,100 rulemaking actions. This averages about 90 proposed rules and 125 final rules per month.

These rules come from a diverse set of agencies with widely varying subject-matter jurisdiction. They include the Departments of Agriculture, Transportation, and Health and Human Services, and the Environmental Protection Agency, which together submitted over 1,150 rulemaking actions last year, as well as the Selective Service System, the Pennsylvania Avenue Development Corporation, and the Panama Canal Commission, which collectively submit only a handful of rules each year.

In 1985, roughly 71% of the draft rules submitted by the agencies for our review under E.O. 12291 were found, after our review, to be consistent with the President's regulatory principles without change, about 23% were consistent with these principles only with change by the agency, slightly over 3% were withdrawn by the agency, 1.5% were returned for agency reconsideration because they were inconsistent with those principles, and 1.5% were identified as emergency regulations, subject to a statutory or judicial deadline, sent improperly or exempt from review.

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[10] See also 31 U.S.C. 1111.

The OIRA "desk officers" -- as OIRA analysts are called -- that review draft agency regulations also review the paperwork requests from the same agency. In fact, most regulations also include matters required to be approved or disapproved by us under the Paperwork Reduction Act.[11]

Business has been brisk under the Paperwork Reduction Act. From 1981 to December 31, 1985, OIRA had reviewed over 20,600 proposed information collections, approving over 18,700 of them, and disapproving over 1,800. This averages about 310 approvals and 30 disapprovals each month. Our average disapproval rate for 1985 was 6.8%. Since 1981, OIRA's average review time for paperwork reviews -- including the time for public comment -- has been 41 days. Although we do not keep track of how many proposed information collections are modified in the course of our reviews, a substantial number are.

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[11] At present, for example, we estimate that 99% of the Department of Agriculture's and the Environmental Protection Agency's reporting and recordkeeping are required by statutes and regulations.

Our reviews of agency reporting and recordkeeping under the Paperwork Reduction Act are closely linked to regulatory matters. More than half of all the Federal reporting burden (or about one billion hours of filling out Federal forms or submitting or storing information; about 500,000 productive work-years) are required by information collections contained in agency regulations or otherwise mandated by law.[12] At least 85% of the Federal paperwork burden is imposed for regulatory or compliance purposes. In other words, today, the paperwork business is regulatory business and vice versa. Despite our best efforts to reduce regulatory burden, business is still booming.

Because many paperwork requirements are imposed through agency rulemaking, we coordinate both our Paperwork Reduction Act and E.O. 12291 reviews as much as possible in our efforts to improve the quality of information collected and to reduce unjustified burden and costs. In some cases, however, burdensome requirements are required by statute.[13]

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[12] Information Collection Budget of the United States Government, Fiscal Year 1986, p. 16.

[13] For example, the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616 (November 8, 1984)) to the Resource Conservation and Recovery Act (RCRA) (P.L. 94-580 (October 21, 1976), as amended; 42 USC 6901, et seq.) require recordkeeping and reporting burdens that will impose roughly 1.9 million hours of burden in FY 1986 and even more burden in subsequent years. Section 9002(a) of RCRA will impose over 400,000 burden hours in FY 1986 by requiring three to five million owners of underground storage

(Footnote continued)

II. Congressional Regulatory and Paperwork Initiatives

Many of the regulatory and paperwork oversight activities of the Executive branch have been studied, recommended, or reviewed by congressional committees. In October 1977, the Commission on Federal Paperwork, chaired by Congressman Frank Horton and co-chaired by Senator Thomas J. McIntyre,[14] concluded that Federal paperwork cost about $500 a year for each person in this country -- $25 to $32 billion for private industry; $5 to $9

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[13] (continued)
tanks (e.g., gas stations, airports, other businesses) to notify the State in which each is located of the existence of such a tank, specifying its age, size, location, and use. Section 3010(a)(3) of RCRA imposes roughly 650,000 paperwork burden hours each year by requiring producers, burners, distributors, and marketers of a fuel produced from a hazardous waste (including used oil) to notify EPA of their activity.

While such reporting may be useful for regulatory enforcement purposes, the specificity and inflexibility of such a statutory provision prevents EPA and the States from collecting only that information that they find from experience that they really need. Because of the burden already mandated by statute, there are few incentives for them to seek other information that may be more useful for monitoring and enforcement. Regardless of the regulatory policy involved, the States, EPA, and we would all prefer greater flexibility to tailor public reporting requirements to present and future enforcement strategies.

[14] The Commission was established in accord with P.L. 93-556 (December 27, 1974). Members of the Commission included Senator Mark Hatfield and Congressman Tom Steed. The purpose for creating the Commission was a finding that "that Federal information reporting requirements have placed an unprecedented paperwork burden upon private citizens, recipients of Federal assistance, businesses, governmental contractors, and State and local governments." § 1(a). For the source of these cost figures, see the October 3, 1977 Final Summary Report of the Commission on Federal Paperwork, page 5.

billion for State and local government; $8.7 billion for individuals; $350 million for farmers.[15] In a program-by-program review, the Commission found that Federal paperwork was, quite frankly, a mess.[16] The recommendations of the Commission led to the revision of the Federal Reports Act of 1942 that became the Paperwork Reduction Act of 1980.

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[15] These estimates were in 1977 dollars. Converted to current dollars, the Commission would have concluded that Federal paperwork cost $830 a year for each person in this country -- $41.5 to $53.1 billion for private industry; $8.3 to $14.9 billion for State and local government; $14.4 billion for individuals; $581 million for farmers.

[16] For example:

Although consumer credit protection statutes were intended to benefit consumers, "they have resulted in costly, complex and confusing paperwork." (Page 30 of the Final Summary Report).

"[T]he Federal Government did not know who was collecting what, from whom, or for what purpose in education." (Page 31).

The "diffusion and fragmentation" of employment and training programs "has led to, and is perpetuated by, substantial amounts of unnecessary and duplicable paperwork, while pressing and legitimate information needs are not met." (Page 32).

"Cost burden associated with the preparation of [energy] forms is absorbed by consumers through higher utility bills and gasoline prices." (Page 33).

"Overlapping and sometimes conflicting Federal, State and local review requirements" and "[r]epetitious submittal of similar or identical material to an agency" as part of the "time-consuming and costly process involved in the development of EIS's [Environmental Impact Statements]." (Page 34).

"Compliance with EEO [Equal Employment Opportunity] regulations and laws is complicated by multiple, diverse and sometimes conflicting agency requirements and forms." (Page 35).

"[N]ot all current paperwork is necessary for sound program planning and control" of Federal health programs. "Much of it is attributable to private associations and State governments. However, much of it stems from inconsistent congressional action, administrative anomalies within the executive branch, and a disinclination to share data between programs." (Page 37).

As to the programs of the Department of Housing and Urban
(Footnote continued)

During the past ten years, the Senate Governmental Affairs Committee in particular has studied and supported legislative

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[16] (continued)
Development, the Veterans' Administration and the Farmers Home Administration, "[o]verlap is evident," [r]eporting requirements are often excessive, causing costly processing delays and producing duplicative information," and [p]aperwork often substitutes for effective consumer protection." (Page 38).

As to the Occupational Safety and Health Administration, "[r]ecordkeeping requirements are not clear, consistent or relevant in some instances," and "States are overburdened with requests for information from OSHA and with failure to recognize State concerns." (Page 39).

For public works, "[p]rocedures can be used to reduce paperwork while assuring implementation of Federal policies." (Page 43).

"The policies and procedures of the SBA [Small Business Administration] loan process have grown to thousands of pages of confusing rules, regulations and instructions." (Page 45).

"The current social service planning process, needs assessment system, and annual requirement and amendment processes are inadequate. . . . Complex reporting requirements are difficult to comply with, frequently duplicative, and have resulted in expensive data management systems by provider agencies."
(Page 46).

Many tax "schedules and instructions are unnecessarily detailed and complex, and often are written at a reading comprehension level much higher than that of the average taxpayer."
(Page 48).

Simplification of the welfare assistance program "should encompass the development of a basic set of common terms and procedures that will treat the needs of public assistance applicants and recipients uniformly and equitably. These common terms and procedures should by utilized by all Federal agencies, and State/local governments in the administration of current welfare programs or their successors." (Page 49).

proposals to improve the Federal regulatory and information collection systems. Although we believe that Executive Order Nos. 12291 and 12498 and the Paperwork Reduction Act programs have been successful, several of the findings of earlier studies are unfortunately all too accurate a description of some of today's regulatory programs. For example, this Committee found that regulatory agencies, individually and collectively, did not appreciate the impact -- the burden -- of what they were doing. This is the implicit premise of many of the detailed conclusions contained in the seminal six-volume Study on Federal Regulation,[17] issued by this Committee under the chairmanship of Senator Abraham Ribicoff in 1977-78.

> Regulatory decisions, particularly on the implementation of new schemes and the continuation of existing schemes, all too often are based on insufficient analysis and consideration of alternatives. The clearest indication of the truth of this assertion is the fact that even the approximate total costs of Federal regulatory programs are not known, and as such are not subject to regular, periodic review and appraisal. The same is true of the benefits of regulatory activities.[18]

In the Study on Federal Regulation, this Committee found that regulatory agencies were authorized by congressional directives to do so much that agencies had to pick and choose what they would regulate, and in what ways. "Few agencies can be productively active in every area subject to their potential regulatory authority. The agency must therefore establish priorities."[19] This Study recommended that agencies issue statements "of agency goals and priorities for the next few years, setting out items such as . . .

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[17] Study on Federal Regulation, Report by the U.S. Senate Committee on Government Operations,
Vol. I: "The Regulatory Appointments Process," January 1977;
Vol. II: "Congressional Oversight of Regulatory Agencies," February 1977;
Vol. III: "Public Participation in Regulatory Agency Proceedings," July 1977;
Vol. IV: "Delay in the Regulatory Process," July 1977;
Vol. V: "Regulatory Organization," December 1977; and
Vol. VI: "Framework for Regulation," December 1978.

[18] Vol. VI, p. 269.

> [s]pecific objectives for agency action in each of these areas, and projected dates for their accomplishment, along with proposed resource allocations for these areas, sufficient to accomplish each objective by the specified date,

and a

> [d]iscussion of the criteria by which these areas were selected and these objectives and dates were specified.[20]

This recommendation is very similar to the program that the President instituted earlier this year by Executive Order No. 12498.

During the period from 1976-79, Members of this Committee and of the Senate Judiciary Committee concluded that a major cause for regulatory disarray was that regulatory agencies were not accountable for what they were doing. The Federal establishment, they said, had become "less accountable to the public";[21] there is "nobody directly accountable for the regulations";[22] the "regulatory process in this country has become unwieldy, costly, abusive, ineffective, unaccountable, and anticompetitive";[23] and there was a need to make "the regulators, themselves, more accountable to the American people."[24]

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[19] Vol. IV, p. 153.

[20] Vol. IV, p. 171.

[21] Senator Edward Kennedy, Hearings on Administrative Procedure
(Footnote continued)

Members were also not at a loss for solutions to this regulatory disarray, often pointing to the need for better management of agency regulatory activities. A 1976 report issued by House Subcommittee Chairman John E. Moss pointed out that "the effectiveness of regulation can be increased significantly by . . . reducing and eliminating duplicative, anticompetitive, and ineffective programs."[25] In 1979, Senator William Roth suggested that the regulatory system "is desperately in need of a mechanism for balancing the demands of competing and conflicting regulatory

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[21] (continued) Act Amendments of 1976 before the Subcommittee on Administrative Practice and Procedure of the U.S. Senate Committee on the Judiciary, April 28, 1976, p. 2.

[22] Senator Paul Laxalt, presiding at Hearings on Administrative Procedure Act Amendments of 1978 before the Subcommittee on Administrative Practice and Procedure of the U.S. Senate Committee on the Judiciary, September 12, 1978, p. 1.

[23] Senator Carl Levin, appearing before Hearings on Regulatory Reform Legislation before the U.S. Senate Committee on Governmental Affairs, March 20, 1979, p. 11.

[24] Senator Thomas Eagleton, ibid., p. 159.

[25] Federal Regulatory and Regulatory Reform, Report by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, October 1976, p. 539.

agencies and programs,"[26] and Senator Lloyd Bentsen argued that "to say the executive department cannot help in the coordination of these [regulatory] programs doesn't make any sense to me. We see conflicts in those regulations -- different agencies trying to accomplish different objectives without any consideration of coordination of very complex programs. As a result we have continuing conflicts among some of them, we have duplication, we have regulations which are wasteful and costly."[27] In 1981, Senator Roth stated that:

> One of the problems we have in government today is no one can make clear, effective decisions. The regulatory process must indeed by improved so that costs are reduced but it also must be redesigned so that agency officials are accountable to the people for their decisions and so that effective decision-making can take place.[28]

As Congress and the Executive branch began work on legislation to address these problems -- usually proposals to amend the Administrative Procedure Act of 1946 -- Presidents Nixon, Ford, and Carter each took action as Chief Executive to address the problem. President Nixon established in the Executive Office of the President a "Quality of Life" review of certain regulations.[29] President Ford issued Executive Order No. 11821 to require agencies to prepare, and OMB to review, inflation impact statements -- the precursors of "regulatory impact analyses" -- for "major" agency rules.[30] And, President Carter issued Executive Order No. 12044 requiring detailed analyses of agency regulatory actions and review by the Executive Office of the President.[31] As President Carter pointed out in issuing this Order:

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[26] Hearings on Regulatory Reform Legislation before the U.S. Senate Committee on Governmental Affairs, March 20, 1979, p. 10.

[27] Hearings on Executive Branch Review of Environmental Regulations before the Subcommittee on Environmental Pollution, Senate Committee on Environment and Public Works, Serial No. 96-H4, February 27, 1979, p. 234.

[28] Hearings on Regulatory Reform Legislation of 1981 before the U.S. Senate Committee on Governmental Affairs, May 12, 1981, p. 1.

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[29] See October 5, 1971 Memorandum for the Heads of Departments and Agencies entitled, Agency regulations, standards, and guidelines pertaining to environmental quality, consumer protection, and occupational and public health and safety, from OMB Director George P. Shultz. For certain categories of regulations, agencies were instructed to provide OMB a summary description indicating:

"- the principal objectives of the regulations, standards, guidelines, etc.;

"- alternatives to the proposed actions that have been considered;

"- a comparison of the expected benefits or accomplishments and the costs (Federal and non-Federal) associated with the alternatives selected; and

"- the reasons for selecting the alternative that is proposed."

[30] 39 Fed. Reg. 41501 (November 29, 1974), extended by Executive Order No. 11949, 42 Fed. Reg. 1017 (January 5, 1977). OMB Circular No. A-107 (January 28, 1975) entitled, Evaluation of the Inflationary Impact of Major Proposals for Legislation and the Promulgation of Regulations or Rules, instructed agencies to include in the evaluation they gave OMB:

> "an analysis of the principal cost or other inflationary effects of the action ...
>
> "a comparison of the benefits to be derived from the proposed action with the estimated costs and inflationary impacts ..., and
>
> "a review of alternatives to the proposed action that were considered ... ."

> Regulation has a large and increasing impact on the economy. Uncertainty about upcoming rules can reduce investment and productivity. Compliance with regulations absorbs large amounts of the capital investments of some industries, further restricting productivity. Inflexible rules and massive paperwork generate extra costs that are especially burdensome for small businesses, state and local governments, and non-profit groups. Regulations that impose needless costs add to inflation.
>
> Our society's resources are vast, but they are not infinite. Americans are willing to spend a fair share of those resources to achieve social goals through regulation. Their support falls away, however, when they see needless rules, excessive costs, and duplicative paperwork. If we are to continue our progress, we must ensure that regulation gives Americans their money's worth.[32]

Thereafter, both the Senate Governmental Affairs Committee[33] and the Senate Judiciary Committee[34] held hearings on the problems with Federal regulations identified in the 1977-78 Study on Federal Regulation and on Carter Administration proposals for

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[31] 43 Fed. Reg. 12661 (March 24, 1978). For "major" regulations, agencies were to develop a Regulatory Analysis that contained:

> "a succinct statement of the problem; a description of the major alternative ways of dealing with the problem that were considered by the agency; an analysis of the economic consequences of each of these alternatives and a detailed explanation of the reasons for choosing one alternative over the others."

[32] President Carter's Regulatory Reform Message to the Congress, March 26, 1979, p. 3.

[33] Hearings on Regulatory Reform Legislation before the Senate Committee on Governmental Affairs, March 20, 1979.

[34] Hearings on Regulatory Reform before the Senate Committee on the Judiciary, Serial No. 96-28, June 13, 1979.

regulatory reform. The Carter bill had five key goals: making new rules more cost-effective; assuring periodic review of old rules; improving agency planning and regulatory management; cutting needless delay; and enhancing public participation. The Carter bill was reported favorably from both committees.[35] Instead of passing that bill, however, the Congress codified a requirement for a regulatory flexibility agenda -- a twice-a-year publication and brief description of regulations that an agency expects to propose or promulgate in final form within the next 12 months, together with an approximate schedule for completing the action.[36]

Although enactment of more far-reaching regulatory reform legislation proved elusive, the Senate Governmental Affairs Committee reported the measure ultimately enacted as the Paperwork Reduction Act of 1980. Among other things, the Paperwork Reduction Act established the Office of Information and Regulatory Affairs. In addition to updating and revising the Office's information policy, statistical policy, and paperwork reduction responsibilities, the Act also clearly brought Federal regulatory activities within the purview of the new Office.

In fact, one of the last issues to be resolved before passage of the bill (S. 1411) in the Senate was Amendment No. 1777 by Senator Edward Kennedy, on behalf of the Judiciary Committee, to coordinate OMB reviews of "collection of information requirements" in agency rules with agency rulemaking procedures under the Administrative Procedure Act, and, implicitly, with regulatory oversight by the Executive Office of the President.[37]

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[35] Reform of Federal Regulation, Joint Report 96-1018 of the Senate Committee on Governmental Affairs and the Senate Committee on the Judiciary, October 30, 1980.

[36] P.L. 96-354 (September 19, 1980); 5 U.S.C. Chapter 6.

The Senate's final paperwork bill, as amended, carefully balanced (1) the statutory authority of the Executive, taking into account the President's constitutional authorities, to oversee and manage agency regulatory activities and to approve or disapprove paperwork requests in rules, (2) with the efficiency, and the necessity, of creating a public record for agency rulemaking. In essence, the "Kennedy" amendment required an agency to notify OMB as soon as practicable of a reporting or recordkeeping requirement in a proposed rule. OMB would then have sixty days to comment. When the agency adopted its final rule, it had to respond to these OMB comments by modifying the rule or by explaining why it rejected OMB's comments. After that, if OMB found the agency's response "unreasonable," OMB had "final power" to overturn it.[38]

In 1981-83, we worked closely with the Congress to enact oversight procedures and other regulatory reforms. At the same time, the President signed and had OMB implement Executive Order No. 12291.[39] The Laxalt-Leahy Regulatory Reform Bill, S. 1080, was favorably reported from both the Senate Judiciary and the Senate Governmental Affairs Committees. S. 1080 passed the Senate by a vote of 94-0 with strong Administration support.

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[37] 44 U.S.C. 3504(h).

[38] Senator Edward Kennedy, 126 Cong. Rec. S14689 (November 19, 1980).

The versions of S. 1080 reported from these two Committees were different, and we helped to resolve the differences between them. For example, in this Committee, we worked with Senators Roth, Eagleton, their staffs, and others on the definition of what rules would be subject to the cost-benefit analysis that would have been required by the bill, and the provisions defining the statutory role of the President in the review of agency rulemaking activities.

We also worked with the Committee to resolve critical issues concerning statutory Executive oversight provided by the bill. The Administration worked with Senators Levin and Rudman and others on an amendment to provide information about the role of the Executive Office of the President in reviewing regulations; this amendment passed the Senate by a vote of 92-0.

As passed, the bill applied not only to the Cabinet and other regulatory agencies, but also to the so-called "independent regulatory commissions." It authorized the President "to establish procedures for agency compliance" with the regulatory reform initiatives, and authorized the President "to monitor, review, and ensure agency implementation of such procedures."[40] The next year, in 1983, we again supported this legislation even though the House leadership had blocked House consideration during the prior year of S. 1080 or its companion legislation, H.R. 746, that had been favorably reported by the House Judiciary Committee.[41]

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[39] 46 Fed. Reg. 13193 (February 19, 1981).

During the Second Session of that Congress -- the 98th -- Senators Danforth, Chiles, Durenberger, and Levin introduced S. 2433, the "Paperwork Reduction Act Amendments of 1984." We supported this bill. S. 2433 was reported unanimously from Senate Governmental Affairs, but was not considered by the Senate.

S. 2433 included a modified "Levin-Rudman" amendment, requiring that written materials concerning a rule that are exchanged between OIRA and the head of a rulemaking agency during the OIRA review, including drafts of proposed and final rules, be made publicly available once the OIRA review had been completed, and the proposed or final rule is published in the Federal

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[40] § 624(a).

[41] Regulatory Procedure Act of 1982, Report 97-435 of the House Committee on the Judiciary, February 25, 1982.

Register. This provision would have modeled our practices in reviewing rules under E.O. 12291 to those required in reviewing paperwork requests in rules under the Paperwork Reduction Act. As I testified in my confirmation hearings, it is my view that we should continue to support enactment of this provision, as reported. Others within the Administration, however, question the constitutionality and appropriateness of any legislation requiring public disclosure of information requested by the President.[42]

Despite other hearings and congressional reports,[43] there has been little subsequent legislative action in Congress. There has, however, been considerable activity in the States. By 1983,

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[42] "(1) The Administrator shall make promptly available to the public upon a request made after the date on which a proposed or final rule reviewed by the Office of Information and Regulatory Affairs is published in the Federal Register --

> "(A) a copy of any draft of such proposal or final rule submitted for review to the Office by the agency proposing or promulgating such rule;
>
> "(B) any written material concerning such draft submitted to the Office by the rulemaking agency with or after a submission of a draft rule under paragraph (A); and
>
> "(C) any written material concerning such draft submitted by the Office of the rulemaking agency after the submission of a draft rule under paragraph (A).

"(2) The Administrator shall make the copies and materials described in paragraph (1) available to the public whether or not the review of a rule described in such paragraph is conducted pursuant to this chapter [of title 44].

"(3) Compliance by the Director or Administrator with the requirements of this section shall not be subject to judicial review."

See pages 21-23 of Paperwork Reduction Act Amendments of 1984, Report 98-576 of the Senate Committee on Governmental Affairs, August 6, 1984.

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[43] Hearings on Regulatory Procedures Act of 1981 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Serial No. 27, March 24 to September 10, 1981.

Hearings on Role of OMB in Regulation before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, June 18, 1981.

Hearings on Congressional Review of Agency Rulemaking before the Subcommittee on Rules of the House of the House Committee on Rules, October 7 to November 19, 1981.

Hearings on Regulatory Reform Act before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, June 8 to July 28, 1983.

Hearings on the Supreme Court Decision in INS v. Chadha and its Implications for Congressional Oversight and Agency Rulemaking before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, Serial No. 18, July 18 to 21, 1983.

Hearings on the Regulatory Reform Act before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Serial No. J-98-65, Parts 1 and 2, September 21, 1983 and January 19, 1984.

OMB Interference with OSHA Rulemaking, Report by the House Committee on Government Operations, December 1, 1983.

Hearing on Congressional Review of Agency Rules before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Serial No. J-98-93, February 8, 1984.

Hearings on Legislative Veto after Chadha before the House Committee on Rules, November 9, 1983 to May 10, 1984.

HHS' Failure to Enforce the Food, Drug, and Cosmetic Act: the Case of Cancer-causing Color Additives, Report by the House Committee on Government Operations, June 3, 1985.

EPA's Asbestos Regulations, Report on a Case Study on OMB Interference in Agency Rulemaking, by the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, October 1985.

at least 18 States employed some form of Executive review to oversee State regulatory agencies.[44]

The concept of a central agency responsible for regulatory review, under the control of the State governor, has been developed in the California Office of Administrative Law,[45] which reviews all proposed rules for their effectiveness and can also review existing rules. If this California Office rejects a proposed rule, the rule cannot become effective unless the State regulatory agency persuades the Governor to reverse the Office of Administrative Law. In three other States, rules cannot become effective until the Governor approves them. Over 40 States provide for advance clearance of proposed rules by the State Attorney General. Under the 1981 revision of the Model State Administrative Procedure Act and in some States, rules become effective when adopted by the State regulatory agency, but can be vetoed by the Governor.[46]

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[44] Jody K. Falk, "State Regulatory Development and Reform: An Overview," 1985 Ariz. St. L. J. 298. These States are Arizona, California, Colorado, Delaware, Georgia, Hawaii, Indiana, Illinois, Iowa, Maryland, Mississippi, Nebraska, North Carolina, New York, Pennsylvania, Utah, Vermont, and Wyoming. Two other States -- Minnesota and Florida -- have elaborate regulatory oversight mechanisms, based at least partly on an administrative judiciary in the State Executive branch.

[45] See "Executive Control of Rulemaking: The Office of Administrative Law in California," by Monroe E. Price, April 1981 Report of the Administrative Conference of the United States.

[46] Professor L. Harold Levinson, "Congressional Oversight of Agency Rulemaking: Options Available After Chadha,"
(Footnote continued)

III. Executive Obligations and Response

These Federal and State efforts to evaluate and control regulatory activities have been in reaction to a cardinal change in government. With the explosive growth of new regulatory programs and new agencies in the 1960's and 1970's, Federal regulatory activity was fundamentally transformed from its prior role in American society. It was no longer simply limited to the administrative law activities of a few specific agencies issuing individual decisions that resembled legal judgements that affected only a few industries. By the early 1970's, Federal regulation had become a major part of the work of Federal agencies, affecting virtually the entire economy and the entire society. It had also become one of the dominant issues in the national political debate.

Given its scope, economists and other analysts had already pointed out a wide variety of problems. Regulations imposed a "hidden tax" (additional costs of engaging in work) which was often shifted from the person required to comply (often business,

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[46] (continued)
Twenty-Seventh Plenary Session of the Administrative Conference of the United States, Discussion of December 15, 1983, Appendix B at p. 24.

As to the need for central State Executive regulatory oversight, see Bruce Babbitt, Governor of Arizona, "State Regulatory Reform -- A Gubernatorial Perspective," 1985 Ariz. St. L. J. 253.

the State government) to the consumer (e.g., individuals, hospitals, colleges, local governments) in the form of higher prices or costs. To the extent regulations imposed costs on widely used items (e.g., autos), the hidden tax tended to be more regressive than the Federal income tax.

With particular reference to health, safety, and environmental regulation, analysts also pointed out the basic problem of defining what was to be regulated, and to what end. Given the finite limits on social and economic resources, it was impossible to reduce the risk of all potential harms to zero. This left the regulator -- regardless of his authorizing legislation -- with the fundamental decisions of: where to begin and where to stop; who should reduce the harm of which risks and by how much; and how to balance regulatory priorities in order to maximize the benefits to all.

The President has the authority to address some of these problems by virtue of his constitutional responsibilities as the Chief Executive.

The framework of modern Presidential regulatory oversight authority is based on three realities. First, as a general matter, the President does not execute Federal regulatory law; his appointees do.[47] Second, these appointees work for the

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[47] For example, on September 11, 1789, President George Washington
(Footnote continued)

President, and generally can be removed by him for any reason, or for no reason at all.[48] Third, because the President is accountable to the public -- the voter -- for how his appointees execute the law, he is obligated to oversee and manage what they do.

This responsibility is clearly recognized in the

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[47] (continued)
commissioned Alexander Hamilton to be his Secretary of the Treasury. He stated:

> I have nominated, and by and with the advice and consent of the Senate, do appoint him Secretary of the Treasury for the said United States, and do authorize and empower him to execute and fulfil [sic] the Duties of that Office according to Law, and to have and to hold the said Office, with all the Powers, Privileges, and Emoluments, to the same of Right appertaining, during the pleasure of the President of the United States for the time being.

On September 26, 1789, President Washington commissioned Thomas Jefferson to be Secretary of State, likewise "during the pleasure of the President of the United States for the time being." In contrast, President Washington commissioned John Jay to be Chief Justice of the Supreme Court, "during his good Behaviour."

[48] John Quincy Adams, prior to his presidency, stated his own principles on his role as an upcoming member of the Cabinet. He wrote in a letter to his wife, Abigail:

> . . . For myself I shall enter upon the function of my office with a deep sense of the necessity of union with my colleagues, and with a suitable impression that my place is subordinate. That my duty will be to support, and not counteract or oppose, the President's administration, and that if from any cause I should find my efforts to that end ineffectual, it will be my duty seasonably to withdraw from the public service. (Adams, Writings, VI., 182 (May 16, 1817)).

Constitution. "The executive power under our Constitution, after all, is not shared -- it rests exclusively with the President."[49] The President, as Chief Executive, is to manage the Executive branch; take care that the laws are faithfully executed; guide and supervise his appointees in the exercise of their Executive functions; and require their written opinions on matters within the scope of their responsibilities.

The Chief Executive -- the only official in the Executive branch mentioned in the Constitution and the only elected official (besides the Vice President) to be elected by all of the people -- acted in fact from the start as the Chief Executive. President George Washington, for example, had heads of the Departments transmit their proposed answers on correspondence to him for his approval. So did President Thomas Jefferson:

> By this means, [Washington] was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever Department they related; he formed a central point for the different branches; preserved an unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent on him; and met himself the due responsibility for whatever was done. . . . [This oversight mechanism] produced us in return the benefit of his sanction for every act we did.[50]

Since then, Presidential oversight of Federal appointees has become more complicated. But the constitutional responsibilities and the public accountability of the President for the actions of his appointees has remained the same.

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[49] Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981).

[50] President Jefferson's Circular to the Heads of Departments, November 6, 1801.

As noted above, each of the last four Presidents of both parties have taken steps -- with increasing sophistication -- to exert greater discipline over their appointees' execution of their regulatory responsibilities assigned by law. President Nixon initiated a "Quality of Life Review,"[51] President Ford called for "Inflationary Impact Statements,"[52] and President Carter for "Regulatory Analysis" and a "Semiannual Agenda of Regulations."[53]

When President Reagan came into office, he initiated the Economic Recovery Program. One of its four key elements was a commitment to relieve the economy of the excessive regulatory burdens that had been piled by Federal departments and agencies upon virtually every facet of our economy, our society, and our everyday lives.

Responsibility for regulatory relief was placed at the highest level of Government, a Presidential Task Force on

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[51] See October 5, 1971 Memorandum for the Heads of Departments and Agencies from OMB Director George P. Shultz.

[52] Executive Order No. 11821 (11/27/74), extended as "Economic Impact Statements" by Executive Order No. 11949 (12/31/76).

[53] Executive Order No. 12044 (3/23/78). Congress subsequently codified a requirement for a regulatory flexibility agenda in 5 U.S.C. Chapter 6. P.L. 96-354 (September 19, 1980).

Regulatory Relief, chaired by Vice President Bush. In order to permit his new appointees to evaluate the substance of new regulations and to provide an opportunity to review the so-called "midnight regulations," the President directed 12 Federal Departments and agencies to postpone the effective dates of pending regulations and to delay issuing new final regulations.

A few days later, on February 17, 1981, in order to institutionalize Executive oversight of Federal regulatory action, President Reagan issued Executive Order No. 12291, "Federal Regulation." The basic regulatory principles of E.O. 12291 are straightforward:

> The Federal Government should not regulate unless there is adequate information concerning the need for and the consequences of proposed regulatory action.
>
> The Federal Government should be sure that the benefits of a given regulatory action exceed the costs.
>
> The Federal Government should choose the regulatory option that maximizes net benefits to society.
>
> Where it is impossible to quantify benefits, the Federal Government should be sure that it has chosen the most cost-effective solution (including the solution that chooses the best and most responsive unit of Government to implement the regulation).

The heads of Departments and agencies were instructed to apply these principles to the extent they could, consistent with applicable law. To ensure consistency with these principles, the President instructed that all proposed and final regulations be submitted for OMB review before publication.[54] Major rules ($100 million or more likely economic effect) were to be supported by formal Regulatory Impact Analyses.[55]

Over the last four years, the Administration -- the Departments and agencies and the Executive Office of the President, working together -- has substantially reduced the burden and intrusiveness of Federal regulatory programs. We eliminated many needless rules, revised ill-conceived ones, and held the number of new rules to the minimum necessary. The policies and procedures of E.O. 12291 imposed long needed discipline on the rulemaking process.

It became obvious, however, that much more could and should be done. Despite E.O. 12291, Federal regulations were managed far less systematically than direct Government spending, despite the mammoth expenditures they exacted from some and the benefits they gave to others. E.O. 12291 reviews often came too late in

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[54] The OMB Director has delegated the regulatory review authority granted him by Executive Order No. 12291 to the Administrator of the Office of Information and Regulatory Affairs.

[55] A Regulatory Impact Analysis is to include a description of:

> "the potential benefits of the rule, ...
>
> "the potential costs of the rule, ...
>
> "the potential net benefits of the rule, ...
>
> "alternative approaches that could substantially achieve the same regulatory goal at a lower cost, ... and
>
> "any legal reasons why the rule cannot be based on the requirements set forth in Section 2 of this Order."

the regulatory process, after huge investments of agency time and resources, often after the Washington "drum beat" of press releases, speeches, "leaks," statements from informal sources, and commitments to constituents had virtually precluded any rational rulemaking decision by those assigned by statute to make it. So unthinkable had become the notion that an agency head could actually make a regulatory decision under these circumstances, that when one was made recently, despite the "drum beat," disgruntled bureaucrats openly questioned the authority of the agency head to make a decision that they disagreed with, even though all of the statutory authority to make the decision was vested in that agency head.

The bureaucracy often presented agency heads with *faits accompli* -- finished and sealed with little or no input from them. In many cases, agency heads sometimes learned about the proposals only just before they were submitted for our E.O. 12291 review. These random, occasionally undesirable rulemakings did not constitute or reflect Administration priorities. While they did not occur frequently compared to the total number of regulations issued, they did occur often enough to require Executive attention. Most notably, it occurred with costly regulations that, germinating in a prior Administration and percolating through several Administrations, became creatures seemingly immune to political or policy influence, gaining and retaining a life of their own.

To address these problems, on January 4, 1985, President Reagan issued Executive Order No. 12498, "Regulatory Planning Process,"[56] "[i]n order to see that the laws are faithfully executed, and that the policies of this Administration are reflected in the regulations issued under those laws."[57] This Order builds on the principles and procedures of E.O. 12291. One of its basic purposes is to make certain that the agency head personally is involved in the policymaking process at an earlier point in the agency's rulemaking process.

Under E.O. 12498, certain of the Executive Departments and agencies subject to E.O. 12291 are required to prepare a regulatory overview statement and descriptions of the Significant Regulatory Actions that they were planning or conducting, and submit that plan to OMB, which performs a policy review on behalf of the President in a manner similar to the budget process. President Reagan directed OMB to review each agency's draft regulatory program for consistency with the Administration's regulatory policies and priorities, and with the draft regulatory programs submitted by other agencies. The President also directed OMB to identify further regulatory and deregulatory actions as would be necessary in order to achieve such consistency. Issues raised but not resolved by OMB and the agency were to be referred to an appropriate forum and, when necessary, to the President.

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[56] 50 Fed. Reg. 1036 (January 8, 1985).

[57] The Regulatory Message of the President, published in the Regulatory Program of the United States Government, April 1, 1985 - March 31, 1986, p. vii.

Following this Executive review, the agency statements of regulatory policies and significant regulatory actions were to be compiled and published in the Administration's Regulatory Program. Once the Regulatory Program was published, President Reagan authorized OMB to return for reconsideration any significant rule received under E.O. 12291, if it was not, but should have been included in, or was inconsistent with, the published Program. Special provisions were made for emergency rules or those required by judicial or statutory deadlines.

The regulatory review program initiated under E.O. 12498 is designed to improve the management of the government's regulatory operations. As President Reagan stated on issuing E.O. 12498, each agency head would become "accountable for the management of the regulatory process, to ensure that policy options are not narrowed prematurely and that each significant regulatory proposal will be considered in relation to others."[58]

The publication of the annual Regulatory Program by the Executive permits Congress and the American people to understand more fully the Executive's regulatory choices and its priorities

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[58] Memorandum for the Heads of Executive Departments and Agencies entitled "Development of Administration's Regulatory Program," dated January 4, 1985.

-- to understand more fully at an earlier stage how it intends to exercise the discretion that Congress has provided to it by statute. Sometimes, it can take from two, to five, to eight years for an agency to develop a rule. With the publication of the Regulatory Program, the public will know sooner where the Administration is planning to go -- way before the publication of any proposed rule.

This program complements the E.O. 12291 review process and has provided agency heads and the Chief Executive a better opportunity to decide whether the regulatory activity is worth initiating before committing agency resources to it. This earlier review also helps to avoid delay and avoids the need for "first-time" Executive analysis of basic regulatory strategy at the very end of the rulemaking process.

President Reagan released the first annual Regulatory Program of the United States on August 8, 1985. He stated that this Program "presents, for the first time, a comprehensive program of regulatory policy to be carried out over the coming year." He further stated that "all of this cannot be accomplished simply by publishing a book. This Regulatory Program is the end product of a long process of agencies planning their regulatory activities: gathering and reviewing information, evaluating past progress and program effectiveness, and setting goals and priorities. The publication of the Regulatory Program for 1985 is, however, only the first step in this annual planning process. The next step is for each agency to implement its part of this first Program, as planned and on schedule."[59]

The legal basis for the current program is clearly set forth in the two opinions of the Department of Justice written for the President's consideration prior to his signing E.O. 12291 and E.O. 12498.[60] Each of the regulatory programs of prior Presidents (of both political parties) has been reviewed and determined to be legally valid by the Attorney General at the time. No court has held any of these programs to be invalid. No court has overturned any one of the thousands of agency rules because the rule was issued in accordance with these programs. Perhaps the most relevant judicial opinion is Sierra Club v. Costle,[61] which was issued after E.O. 12291 was signed:

> The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. He and his White House advisors surely must be briefed fully and frequently about rules in the making, and their contributions to policymaking considered. * * * The authority of the President to control and supervise

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[59] The Regulatory Message of the President, published in the Regulatory Program of the United States Government, April 1, 1985 - March 31, 1986, p. vii.

[60] Memorandum of the Office of Legal Counsel, February 13, 1981, concluding that the "Proposed Executive Order Entitled 'Federal Regulation'" is "acceptable as to form and legality."

Memorandum of the Office of Legal Counsel, December 21, 1984, concluding that the "Proposed Executive Order Entitled 'Regulatory Planning Process'" is "acceptable as to form and legality."

[61] 657 F.2d 298, 405-06 (D.C. Cir. 1981).

> executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.

The first case to challenge the basic principles of E.O. 12291 is the ethylene oxide litigation, Public Citizen v. Rowland.[62] The principal issue is whether the rule adopted is arbitrary and capricious. Plaintiffs and several *amici*, on the other hand, have suggested that the case raises the question of whether -- as the Secretary of Labor asserts -- he made the final regulatory decision, or whether -- as plaintiffs contend -- OMB unlawfully displaced OSHA's statutory authority to decide whether a limit on short-term exposure to ethylene oxide should be adopted to protect workers. Briefs have been filed, including an *amicus* brief filed by the Chairmen of five House Committees; oral argument occured on January 22.

IV. OIRA's Disclosure of Information

I have heard concerns expressed about OIRA's alleged secrecy. I would like to set the record straight.

OIRA's policies with regard to disclosure of information and meetings or telephone calls with persons outside the Federal government differ depending upon whether the review is a paperwork review under the Paperwork Reduction Act of 1980 or a regulatory review under E.O. 12291. The different policies arise from the different responsibilities that OIRA has for the two programs.

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[62] Nos. 84-1252, 84-1292, and 85-1014 (D.C. Cir.)

The Paperwork Reduction Act. Under the Paperwork Reduction Act, OMB is required by statute to review and approve or disapprove agency collections of information from the public. OIRA's actions have legal consequences, and they are based upon findings and facts.[63]

Specifically, under the Act, OIRA is required to determine whether the information that the agency proposes to collect "is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility."[64] If OIRA determines that the proposed collection is unnecessary, for any reason, the proposed collection must be denied and the Act prohibits the agency from engaging in the collection of information. In other words, the authority to approve or disapprove a proposed information collection is vested in OIRA, not in the proposing agency; OIRA is responsible for its actions in approving or disapproving the proposal, not the proposing agency; and the decision to approve or disapprove a proposed information collection must be based upon information available to OMB, not on information available only to the proposing agency.

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[63] Shell Oil Co. v. Dept. of Energy, 477 F.Supp 413, 428-430 (D.Del. 1979), aff'd 631 F.2d 231 (Third Cir. 1980), cert. denied 450 U.S. 1024 (1981).

[64] 44 U.S.C. 3508. See also 44 U.S.C. 3504(c)(2).

OIRA's authority under the paperwork clearance authorities of the Paperwork Reduction Act is based upon statute. For an agency rule to contain or mandate an information collection, there are two statutory decisions that must be made before the information may be collected: (1) a decision by the head of an agency to include an information collection in a rule; and (2) a decision by OIRA under the Paperwork Reduction Act as to whether the information that would be collected is necessary for the proper performance of the functions of the agency.

E.O. 12291 Regulatory Review. In contrast to the express statutory authority provided to the Director of OMB (and delegated to the Administrator of OIRA) by the Paperwork Reduction Act, the President's authority to (1) instruct his appointees as to how to exercise discretionary authority vested in them by law; (2) require that these appointees submit regulatory proposals to him; and (3) require OMB to review these proposals and advise the appointee whether they comport with the President's regulatory principles -- the basic tenets of E.O. 12291 -- is derived from the President's inherent authority over the Executive branch in the Constitution of the United States and, implicitly, from the laws of the United States that vest authority in the Presidential appointees. E.O. 12291 specifically provides that it does not displace the authority of an agency head that is assigned to him or her by law.[65] There is no rulemaking-decision authority vested in the Director of OMB by E.O. 12291. In this regard, the Executive Order differs significantly from the Paperwork Reduction Act, which does displace the authority of an agency head to proceed with the collection of information from the public unless the Administrator of OIRA determines that such collection is necessary.

As stated earlier, the authority of the Director of OMB assigned by E.O. 12291 was reviewed by the Department of Justice prior to its execution by the President. The Department described the authority of the Director as follows:

> The function of the Task Force and the Director would be supervisory in nature. It would include such tasks as the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions that do not appear to conform to the principles expressed in the President's Order. Procedurally, the Director and the Task Force would be authorized to require an agency to defer rulemaking while it responded to their views concerning proposed agency action. This power of consultation would not, however, include authority to reject an agency's ultimate judgement, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation. As to these matters, the role of the Director and the Task Force is advisory and consultative. The limited power of supervision embodied in the proposed Order is, therefore, consistent with the President's recognized powers to supervise the Executive Branch without displacing

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[65] § 3(f)(3).

functions placed by law in particular agencies.[66]

OIRA Procedures. The different procedures that OIRA has for its paperwork reviews and for its Executive Order reviews derive from the different role that OIRA has for these two programs. Under the Paperwork Reduction Act, OIRA creates a "record" upon which to base its decision whether to approve or disapprove a proposed collection; its decision is based upon that record.

The Paperwork Reduction Act also provides that "[b]efore making a determination [on whether or not to approve a proposed information collection request] the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing."[67] OMB's rule implementing the Paperwork Reduction Act[68] provides for public notice and comment on proposed agency information collections, and for the maintenance of a public file on each proposal.[69] OIRA "desk officers" are authorized to answer public inquiries with regard to such agency proposals and to meet with or discuss the elements of such proposals with interested parties. Indeed, they are encouraged to do so in order to better understand the need for the information and the burden it would impose upon respondents. For over 40 years, this has been OMB's practice in reviewing agency information collections.

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[66] Memorandum of the Office of Legal Counsel, February 13, 1981, concluding that the "Proposed Executive Order Entitled 'Federal Regulation'" is "acceptable as to form and legality," page 7.

[67] 44 U.S.C. 3508.

[68] 5 CFR Part 1320.

[69] 5 CFR 1320.12(a); 1320.13(a); 1320.14(b); and 1320.18.

On the other hand, under E.O. 12291, because our role is "advisory and consultative," because the regulatory authority of agency heads is not displaced, and because the rule must be supported -- in fact, must be based upon -- the agency "record," we do not provide public notice of our reviews or provide the public with an opportunity to comment on the agency proposal. That has already been done by the agency. Notice has been given, comments have been received, and a "record" has been compiled that typically must provide a rational basis for the rulemaking decisions at hand. We do not open another "docket." Since the regulatory decision is that of the agency head, the decision must be based on the agency "record," and the agency cannot rely on factual information that is not in the agency record. That is why, on June 11, 1981, OMB Director Stockman issued an memorandum intended to advise those who wanted to comment on agency rules to send those comments to the rulemaking agency. Written information from persons outside the Federal Government that has been sent to us has always been made available to those requesting it.

Furthermore, since our role is "advisory and consultative," we have as a matter of policy, not as matter of law, restricted

OIRA discussions, meetings, etc. with persons outside the Executive branch on rules under E.O. 12291 reviews. Only the Administrator and the Deputy Administrator of OIRA may meet or discuss a rule subject to E.O. 12291 review. We do not release material provided to us for E.O. 12291 review, including the drafts themselves, because they are deliberative documents and pre-decisional in nature.[70] We have generally withheld such materials under the so-called Freedom of Information Act, and have been upheld in doing so.[71]

On the other hand, in order to ensure the public and the Congress are fully aware of the Administration's regulatory and information collection policy, the Administration has required all agencies to publish detailed agendas of regulations, and has had agencies publish these agendas in a single government-wide document that facilitates continuous public and congressional scrutiny of current regulatory proceedings. Since 1981, OMB has also published annual reports detailing which agency rules were returned or withdrawn as a result of E.O. 12291 reviews, annual reports describing our efforts to improve information management within the Federal government, and Information Collection Budgets, outlining agency success at reducing paperwork burden and agency plans further to reduce burdens in the future. From early 1981 through the fall of 1983, the Presidential Task Force on Regulatory Relief published several documents describing in advance the existing regulations that had been selected for priority agency review for possible revision or rescission.

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[70] All records of OIRA are retained in accordance with applicable law. As a general matter, and in accord with the deliberative process privilege in litigation and the Freedom of Information Act (5 U.S.C. 552(b)(5)), we will not release to the public draft agency proposed or final regulations, draft agency regulatory plans, and those portions of OMB worksheets and other intra-agency and interagency documents that contain deliberative information. See Sierra Club v. Costle, 657 F.2d 198, 407-08 (D.C. Cir. 1981).

[71] Memorandum Opinion in National Tank Truck Carriers v. OMB, C.A. No. 82-93 (D.C.D.C., May 28, 1982).

The publication of the Regulatory Program for 1985 is the first time any Administration has so fully disclosed its regulatory policies so early in the process of agency development of regulations. Requests for access to such materials by Congress and for our testimony have been honored in every case, although information furnished has pertained only to rules for which we have completed our reviews.

In addition, OIRA has agreed with EPA to an experimental method for handling oral communications from the public. Whenever the Administrator of OIRA or her Deputy acquire factual information regarding an ongoing rulemaking via telephone or a meeting, they will communicate that information to the EPA General Counsel and advise him of the source of the communication. In addition, if a meeting is scheduled with outside parties to discuss a rule, EPA officials will be invited as appropriate to attend. Furthermore, rather than simply making written information from persons outside the Federal government available to EPA, we are sending them copies of all such material.

V. Length of E.O. 12291 Reviews

Finally, I would like to briefly discuss the length of time OIRA takes to review draft agency regulations.

First, I want to put the statistics into the context in which OIRA operates. E.O. 12291 provides 10 days for OMB review of non-major rules. For major rules, the Order affords 60 days of review for a proposed rule, 30 days for final ones. All of these review periods may be extended by notice from OIRA to the agency concerned.

From February 1981, when President Reagan signed E.O. 12291, to December 31, 1985, the statistics for OIRA E.O. 12291 reviews are the following:

* OIRA reviewed a total of 331 "major" rules from all the Departments and agencies subject to the Executive Order. Review of "major" proposed rules averaged about 43 days; review of "major" final rules averaged about 26 days. Reviews of all "major" rules averaged 32 days.

* OIRA also reviewed a total of 11,914 non-major rules under E.O. 12291 in an average of 16 days.

- 81% of all rules were reviewed in 10 days or fewer; 90% were reviewed within 30 days.

- The number of rules reviewed annually has declined slightly -- from 2,803 in 1981, to 2,211 in 1985.

- The percentage of all rules returned, withdrawn, or changed by the agency in order to assure consistency with the President's regulatory principles has increased each year -- from 8.3% in 1981 to 29% in 1985.

- The average review time has increased from nine days in 1981 to 28 days in 1985.

Various parties have expressed particular interest concerning our reviews of EPA regulations:

- Since March 1981, when we began our computerized tracking system, we reviewed 1,947 EPA regulations.

- In 1981, OIRA reviewed 734 EPA regulations. In December 1981, we exempted State Implementation Plan (SIP) approval rules from our review. As a result, we reviewed only 341 EPA rules in 1982, 268 in 1983, 303 in 1984, and 302 in 1985.

- Review time for the 1,947 EPA rules covered since March 1981 has averaged 20 days.

- 73% of all EPA rules were reviewed in 10 days or fewer; 86% were reviewed in 30 days or fewer; and 92% were reviewed in 60 days or fewer.

- As with other agencies, the average review time has increased over time, from 10 days in 1981, to 19 days in 1982, 22 days in 1983, 31 days in 1984, and 35 days in 1985.

- On average, 34 days have elapsed following our completion of review before EPA has published a rule in the Federal Register.

In order to put our reviews of EPA rules into context, we have also compiled a listing indicating OIRA's average review times for all agencies.[72]

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[72] REVIEW OF RULES UNDER E.O. 12291

AVERAGE REVIEW TIME
MARCH 1981-DECEMBER 1985

AGENCY	MAJOR RULES		NON-MAJOR RULES		ALL RULES	
	RULES	AVG REV	RULES	AVG REV	RULES	AVG REV
USDA	100	16	2692	13	2792	13
DOC	13	35	637	11	650	11
DOD	0	0	50	20	50	20
DoED	4	34	390	14	394	14
DOE	9	30	171	7	180	8

(Footnote continued)

During my confirmation hearings last September, Senator Gore submitted a listing of EPA air program rules, providing for each the date of a statutory or judicial deadline, the date of submission to OMB, and the date of publication in the Federal Register. The list did not indicate when OMB review was completed, only when the rule was published. Nor did it indicate when we recorded receipt of the rule.

We have examined this listing with some care. To summarize our findings, it is best to distinguish between the statutory and judicial deadlines.

Statutory Deadlines. The listing contains over 150 EPA Air Program rules. About 100 of these were subject to a statutory deadline.

- 81% of the proposed rules were submitted to OIRA by EPA after the statutory deadline for a final rule had passed.

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[72] (continued)

HHS	27	40	1067	23	1094	24
HUD	9	11	502	17	511	16
DOI	35	9	895	14	930	14
DOJ	0	0	299	10	299	10
DOL	20	67	213	24	233	27
State	1	28	36	9	37	10
DOT	36	40	1167	18	1203	18
Treasury	4	24	185	13	189	13
EPA	36	61	1911	19	1947	20
Other Agencies	37	43	1699	16	1736	16
TOTAL	331	32	11914	16	12245	16

Moreover, EPA submitted these proposed rules an average of 570 days after their final deadline had passed.

* 73% of the draft final rules were submitted to OIRA an average of over 480 days after the statutory deadline had passed.

* EPA submitted the other 27% of the final rules to OMB on average 223 days before the deadline; we completed our review of these rules in an average of about 34 days.

* Our review for all the final rules subject to a statutory deadline averaged 52 days, and EPA took another 66 days on average to publish the rule after we completed our review.

* In only a single case was a final rule under review at OMB while a statutory deadline passed.[73]

Judicial Deadlines. The listing provided by Senator Gore contains about 50 rules subject to a judicial deadline because of lawsuits brought against EPA.

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[73] A draft final rule for Inactive Uranium Mill Tailings was submitted by EPA in June 1982, and returned to the agency on July 8, 1982, several months before an October 1, 1982 deadline. EPA resubmitted the rule on September 16, 15 days prior to the deadline. We completed our review on December 31, 1982, approximately ten weeks after the deadline. EPA published the rule on January 5, 1983.

- In contrast to its record with regard to statutory deadlines, EPA submitted 93% of the rules subject to a judicial schedule before the deadline. These rules were submitted an average of 29 days before the judicial deadline, and we completed our review on average within 18 days.

- In only one case was a rule submitted for our review before the judicial deadline but for which our review was not completed until after the deadline.[74]

- EPA took an average of 16 days to publish a rule after our review was completed. As a result, EPA missed the judicial deadline in 69% of the cases even though our review (except in the case of Radionuclides) was always completed prior to the deadline.[75]

We monitor closely both the rules under our review and the length of time we take to review them. We are concerned that they not take too long. On occasion they do, but we try to limit those occasions. Overall, I think our record over the last 5 years has been quite good. The number of protracted rulemakings have been few, especially in light of the large number of draft rules and draft collections of information we have reviewed. For EPA in particular, our reviews are not the cause of the deadlines that EPA has missed. Compared to the length of time it takes EPA to develop a rule -- often this takes several years -- our review times are quite short. To reiterate, our reviews average fewer days than it takes EPA to transmit the rules to the Federal Register after we have completed our review. We will continue to monitor our review work very carefully.

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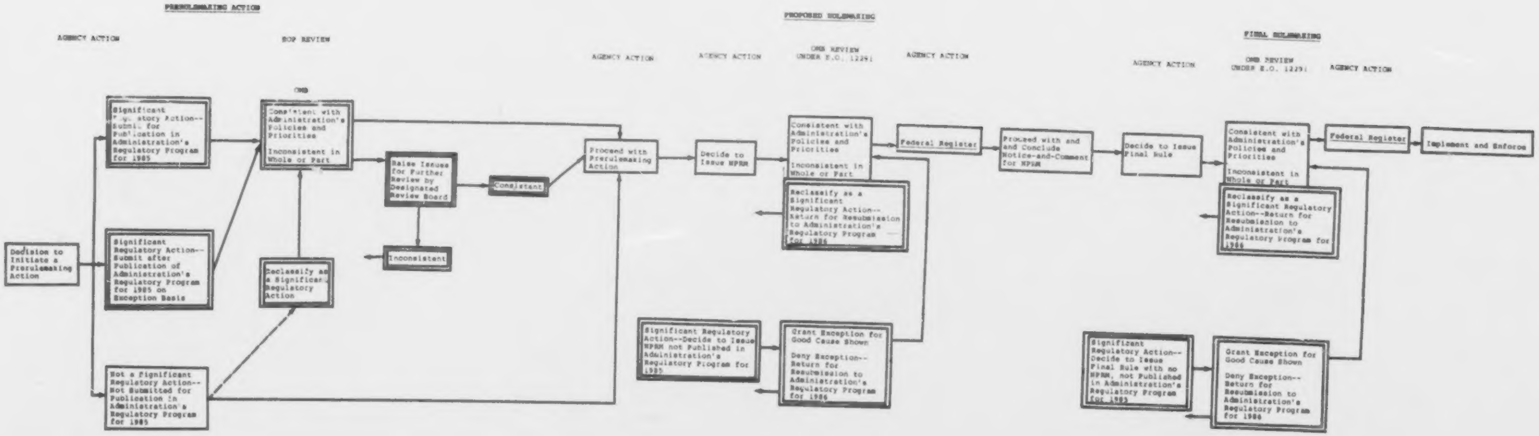
[74] For that rule -- Radionuclides, Three Categories -- EPA submitted the rule two days before the January 10, 1985 deadline. We completed our review in 10 days, and EPA published the rule 19 days after we completed our review.

[75] For example, eighteen days before the August 30, 1985 judicial deadline, EPA submitted the Idaho Lead SIP. We completed review in six days, on August 20, but it took EPA 21 more days to publish the rule, on September 10 -- ten days after the judicial deadline.

* * * * *

I want to thank you for your interest in our efforts to improve the management of Federal regulation and information collection, and to reduce the unjustified burdens imposed by them. If you have any further questions, I welcome the opportunity to answer them.

ADMINISTRATION REVIEW OF AGENCY REGULATORY PROGRAMS


PRERULEMAKING ACTION
AGENCY ACTION
EOP REVIEW
OMB
Decision to Initiate a Prerulemaking Action
Significant Regulatory Action--Submit for Publication in Administration's Regulatory Program for 1985
Significant Regulatory Action--Submit after Publication of Administration's Regulatory Program for 1985 on Exception Basis
Not a Significant Regulatory Action--Not Submitted for Publication in Administration's Regulatory Program for 1985
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Reclassify as a Significant Regulatory Action
Raise Issues for Further Review by Designated Review Board
Consistent
Inconsistent
PROPOSED RULEMAKING
AGENCY ACTION
Proceed with Prerulemaking Action
AGENCY ACTION
Decide to Issue NPRM
OMB REVIEW UNDER E.O. 12291
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Reclassify as a Significant Regulatory Action--Return for Resubmission to Administration's Regulatory Program for 1986
Significant Regulatory Action--Decide to Issue NPRM not Published in Administration's Regulatory Program for 1985
Grant Exception for Good Cause Shown
Deny Exception--Return for Resubmission to Administration's Regulatory Program for 1986
AGENCY ACTION
Federal Register
Proceed with and and Conclude Notice-and-Comment for NPRM
FINAL RULEMAKING
AGENCY ACTION
Decide to Issue Final Rule
OMB REVIEW UNDER E.O. 12291
Consistent with Administration's Policies and Priorities
Inconsistent in Whole or Part
Reclassify as a Significant Regulatory Action--Return for Resubmission to Administration's Regulatory Program for 1986
Significant Regulatory Action--Decide to Issue Final Rule with no NPRM, not Published in Administration's Regulatory Program for 1985
Grant Exception for Good Cause Shown
Deny Exception--Return for Resubmission to Administration's Regulatory Program for 1986
AGENCY ACTION
Federal Register
Implement and Enforce

Flowchart illustrates Administration Review of Agency Regulatory Actions Under E.O. 12291—Addition of Double-lined Steps Transforms this to Administration's Regulatory Program.

Senator **Durenberger**. Next we will have, if we can manage it, the five remaining experts: Dan Guttman, James Fite, Dr. Harold Seidman, Dr. Gary Bass, and Steven Kargman. We have prepared statements from most of you, which we will make part of the record. You may proceed to deliver them, or summarize them in 5 minutes, if that is possible. In the absence of other Senators who would probably like to be here if it weren't for the hour, we will pose questions to all of you because your testimony is very important. You have been selected for important reasons to be part of this panel. If you don't get all the questions here today, you are going to get them in the mail. If you are willing, we would certainly appreciate your adding to your testimony.

This record will remain open after this hearing for additional testimony by anyone else who has something to say, or additional questions of Mr. Miller. If any of you has questions to be directed to the Office of Management and Budget, we are open to your suggestions as well.

We will begin with Dan Guttman.

TESTIMONY OF DAN GUTTMAN, SPIEGEL & McDIARMID: JAMES FITE, EXECUTIVE DIRECTOR, WHITE LUNG ASSOCIATION; HAROLD SEIDMAN, GUEST SCHOLAR AT THE BROOKINGS INSTITUTION, PROFESSOR EMERITUS, POLITICAL SCIENCE, UNIVERSITY OF CONNECTICUT; GARY BASS, EXECUTIVE DIRECTOR, OMB WATCH; AND STEVEN KARGMAN, CHAIRMAN, YALE LEGISLATIVE SERVICES, YALE LAW SCHOOL, AND A HENRY LUCE SCHOLAR IN SINGAPORE

Mr. **Guttman**. Thank you, Mr. Chairman. Obviously, I will be brief, my testimony speaks for itself. I am here on behalf of the Service Employees International Union, most of whose 800,000 members work in our Nation's buildings, many of which are laced throughout with asbestos. We are in district court trying to get EPA to act to regulate asbestos in buildings.

I would like, in light of your colloquy with Dr. Miller, to observe that, indeed, perhaps surprisingly to you and to the American public, you can be effective, but you have to be darn obstinate.

A year ago, as you know, Mr. Dingell's committee pounced on OMB for their holding up of the asbestos phasedown and ban rules, and had a major investigation. It subpoenaed witnesses for sworn testimony, after which EPA agreed to reconsider its referral to OSHA.

Now, a year later, you announced that you were going to have this hearing with OMB, and much to everyone's surprise, last Friday, EPA announced it has declared war on asbestos. My mother called me up and said, "I see you have won your lawsuit." I said, "You must be kidding. This has nothing to do with asbestos in buildings and schools."

Here comes Mr. Miller saying, "Well, I am prepared to discuss fully this asbestos question," telling you that as of last Friday, they have declared war on asbestos.

You asked Mr. Miller and Ms. Gramm questions about our claim of coverup, but these people said they were not there at the time the decision in our case was made. Had they been there, they said, their answer would have been, "Whatever it was we did related to this phasedown and ban rule." They have not mentioned the real critical part of the problem: What is happening to asbestos in our Nation's buildings?

People have asked, "Does that mean that asbestos in these millions of buildings now is going to be removed because they declared war?"

No, nothing of the sort, as we detail in our testimony, Dr. Miller talks about statistics, 20 percent, 10 percent, 5 percent. Our union has not looked at thousands of cases of regulations. We looked at one case that affects millions of people, tens of millions, and in that one case, that one case alone, you have a situation of hazard far more severe in terms of public policy than might be imagined from the abstract philosophical questions that Senator Levin was so ably discussing with Mr. Miller.

This is not a question of constitutional law. It is not a question of who has the right to decide. In our case, EPA did not even get out of the starting gate. It wasn't a question of OMB saying, "We don't like your rule." As we lay out in our testimony, OMB scared EPA to death. EPA thought that it couldn't use up its bargaining chips. It was in so many battles with OMB, it said, as one internal memo said, a memo quoting apparently the Deputy Administrator of EPA, "We don't want to piss OMB off by needlessly provoking them."

Instead of trying to needlessly provoke OMB by proposing a rule, a rule which would protect millions of lives, a rule which was initially to be enacted in 1980, EPA not only denied a rulemaking request, but in the process said, "We don't have to have a rule because everything is hunky-dorry. Our problem is being solved."

This is not a cost/benefit case. This is not a case where there is any dispute about costs and benefits. Everybody knows what should be done about asbestos. EPA has a guidance book that has been out since 1979; it says, "Do this, that, and so forth." The only question is: Is it being followed?

EPA said, "We don't need a rule because our guidance is being followed." We went to court, and we found out that it is not. We went to court, and we found out that EPA was covering up the hazard.

So in this case, in our case, it is not a question of OMB saying, "We don't like what you propose," it is an agency being so cowardly, if you will pardon the expression, that it lost its voice. We had to go to court, not merely to get EPA to act, but to get this expert agency to give us its views. To me that is most serious. Constitutional issues aren't to be taken lightly, but when you have an expert agency that is so scared of proposing action that it would rather cover up hazard, that is an extraordinarily serious problem.

The asbestos case is directly relevant to Gramm-Rudman. There is no question, once again, that money should be spent throughout our Nation to clean up asbestos in buildings. In our court case, the asbestos industry is a coplaintiff. The National Governors' Association has come out with a resolution endorsing our rulemaking. The PTA's, you name it, everybody is on one side of the log. EPA expertise is on our side, and the shell of the Agency on the other.

The only question is: Is this money going to be well spent, or is it going to be wasted? When you have an agency coming out and saying that everything is OK, discouraging people from checking on what they are doing, then you have a situation that is not only going to waste money and waste lives, but if you are thinking Gramm-Rudman, if you are thinking narrow cost/benefit, it is going to come back to cost the Federal Treasury many years from now, when people file negligence suits based on EPA's misrepresentation.

Thank you.

Senator DURENBERGER. Thank you

Mr. Fite.

Mr. FITE. Thank you, Senator Durenberger. I have also brought Mr. Safchuck, the president of our organization, with me. We will submit our written testimony and not read it in deference to the time and the hunger of audience.

Senator DURENBERGER. It will be made part of the record.

Mr. FITE. I would like to make a few points.

First of all, the proof is in the pudding, and the pudding here is that we have no regulation. We have no control of the substance asbestos, which is a known and proven carcinogen, in our society. We have no control of what is going through the air system of the GAO building. Eventually, somebody is going to wake up and start keeping records of those GAO employees, and you are going to find excessive deaths.

We are keeping no records of what is going on among the Pentagon employees. We are keeping no records of what is going on in the basement of this building. Let me tell you, when we came in this morning, we were trying to get a cup of coffee, some clown had scraped the "B" off the elevator markings and made it a "3." So we went down to the subbasement by accident. The door opened and there is asbestos contamination right there. We are asbestos victims so immediately we pushed the button to close the door. But I have to think, what about the employees of this building? It has probably been taken out of the Senators' offices, but eventually these maintenance employees are going to wake up to the fact that they are being poisoned, and this is going to cost the U.S. Government a tremendous amount of money.

Anybody who is concerned about what we are spending in this country should be concerned about how much Social Security has spent supporting the victims of occupational disease, particularly asbestos.

Second, I would like to make the point that this situation is out of control, and it is obvious to me from watching you all here that there is a great deal of disagreement or duplicity or deceit, for some reason there is an aura of unreality in this room.

The Senators asking the questions have completely different facts from the man who is running the Agency, completely different opinions. Why is this?

Part of the reason is because it is not just OMB who is quashing the regulatory process. EPA administration is doing the same thing. The OSHA administration is doing the same thing. They are working in conspiracy with each other to restrict and suppress these regulations.

I believe that if we could take the time, we could prove these things because I sat with the Deputy Administrator of EPA and resubmitted the facts on what products should be banned and what products could be used to replace the products that were banned, et cetera. I sat in the top EPA office, where they have trees growing in the office. You look out and it is beautiful. I listened to them whine, cry, and say:

> We can't do that, Jim. Are you kidding, we can't get that by OMB. Don't you understand how things are done these days?

I said, "No, you guys asked me up here to make some comments, so I did." Then they tell me that they can't do it because of OMB. OMB says, "We didn't do it, EPA did it." The bottom line is that it is not being done, and Congress has got to be held responsible.

You are the fellows that we elect. I never get a chance, or maybe once or twice a year, to say anything to OMB or EPA or you. But you are continually here, and the lobbyists for the asbestos industry are continually here. You are the ones who are supposed to be representing us, so we would appreciate it if you would do it with vigor.

Third, all of this, if you look at it in its historical setting, is acting as a covering of the retreat of the asbestos industry. The asbestos industry, you take the Manville Corp., they are declining any use for sale of asbestos. They are getting away from asbestos, and so is the rest of the asbestos industry.

The asbestos industry itself is getting away from asbestos because they don't want to be sued for it. What is happening is how much of their assets can be diverted, how many of their corporate criminals can escape, how long can this continue while this process of getting out of the business goes on.

It is being covered over with this back and forth business between OMB and EPA. This has lasted for years. It has only taken Manville a few years to divest itself, and in a few more years, it will be completely out of the picture. The only people left to bear the brunt of this tremendous tragedy will be the U.S. taxpayers.

Thank you.

Senator DURENBERGER. Thank you very much.

Mr. Seidman.

Mr. SEIDMAN. Thank you very much, Mr. Chairman.

I have a very brief statement, which I believe will be made part of the record.

Senator DURENBERGER. Yes; your statement will be made part of the record.

Mr. SEIDMAN. I will summarize very briefly. I will not be speaking about asbestos, or grain dust, but I have been asked to talk about my view of regulation in a somewhat different context.

I think the current preoccupation of the President, Congress, and the courts with review and control of regulations is an inevitable response to the quiet revolution in the Federal Government's role and the way it conducts its business which has stimulated the proliferation of regulations.

If Executive Orders 12291 and 12498 are to be properly evaluated, it is necessary to understand why regulations are increasingly relied upon as the principal means of influencing Federal policies and achieving Federal objectives. We are concerned here with something more than finding the most effective means for reducing the regulatory burden on the private sector. Control of regulations raises fundamental questions concerning the distribution of power within our constitutional system.

With the exception of programs such as Social Security, there has been a shift from direct to what has been called "indirect or 'third party' government" with responsibility for service delivery delegated to quasi-government or non-Federal entities, such as government-sponsored enterprises, nonprofit corporations, States, cities, counties, special districts, and a wide variety of private businesses. The preferred means for carrying out Federal programs are grants-in-aid to State and local governments, contracts, and loan guarantees.

In the past, the contest between the President and the Congress for power to influence executive policies and actions focused mainly on issues related to executive branch structure. The contest has shifted to a new arena with jurisdiction over review and control of regulations providing the major source of conflict.

The Congress suffered a temporary setback when the Supreme Court held the legislative veto to be unconstitutional, but it is currently exploring alternative methods of reasserting its control over regulations.

In whatever form imposed, however, the legislative veto cannot and was not designed to coordinate and assure consistency in executive rulemaking. As the Congress found with respect to the budget process, information gathering requests by agencies, and legislative clearance, this function can be performed only by the President or his designee. I might add here, many of the questions that were raised this morning about the role of OMB and its influence on executive agencies would also apply to the legislative clearance process.

The duty to secure unitary and uniform execution of the laws is vested by the Constitution in the President. In a system which now relies so heavily on third parties to administer the laws of the Congress, it is doubtful that the President can any longer effectively perform his constitutional duties without exercising some control over regulations and the regulatory process.

It may be argued that review of regulations must now take its place with budgetary review and legislative clearance among the essential management tools which must be available to a President.

The Administrative Procedure Act is silent on the issue of presidential intervention in informal rulemaking. To the extent that the OMB review process makes available to the rulemakers the comments of the affected agencies and the White House, the OMB review process is consistent with and supports the letter and spirit of the Administrative Procedure Act. The availability of such information does not in and of itself limit the discretion of responsible decision makers in reaching informed judgments.

The objections to OMB review of agency rulemaking appear to run more to the potential for abuse and conflicts of existing laws rather than to the need for central clearance and coordination of agency rulemaking. Clearly, the process should not be allowed to become the equivalent of impoundment—a means by which OMB negates the expressed mandates of the Congress and the courts. Safeguards are necessary to maintain accountability to the Congress and to assure that OMB participation in the process is on the record and subject to scrutiny by the public and the courts.

No one disputes that the Congress has the power to define presidential authority over regulations and to prescribe the extent and limits of OMB review of regulations. If the Congress fails to act, determination of OMB's role in the review process will go by default to the President and the judiciary.

The time has come for the Congress to consider again the enactment of legislation providing a statutory base for executive review of regulations, establishing policies and procedures applicable to such reviews, and defining the powers of the Office of Management and Budget.

Thank you.

Senator **Durenberger**. Thank you very much.

Dr. Gary Bass.

Mr. **Bass**. I am representing OMB Watch. Focus Project is the incorporated name for OMB Watch.

If the rumors be true, the tragedy that has befallen the shuttle is certainly taking my breath away.

Senator **Durenberger**. They are more than rumors.

Mr. **Bass**. It is true. It has certainly taken the breath away from me. It is certainly not equal to simply talk about rulemaking, but it is also a subject that takes my breath away.

Let me just start by saying, and I will be very brief, since my statement will be submitted for the record as you have said earlier, we have been talking primarily about EO 12291. There is another Executive order out there numbered 12498. Almost all of the discussion that we have had today would be almost, in essence, preempted by EO 12498. That is, we would never discover many of the things that we have talked about today under the new rule.

First off, let me say that the new Executive order goes well beyond EO 12291 in the sense that it includes pre-rulemaking actions, and that is defined virtually by anything that OMB wants, and it can go as far back as discussions at the agency level.

I will enclose with my testimony several exhibits, one of which demonstrates the role of the OMB desk officer in meeting with agency personnel, and keeping certain activities from ever making the final regulatory program.

Let me go really to the heart of the matter. Dr. Miller said, in his testimony at the confirmation time, "Let the sunshine in." He said today virtually the same thing; and he actually put his hands up and said, "This is good," in reference to his earlier statement. There are several things here.

First, under 12498, we are, in essence, undercutting the procedural safeguards that have been set up by Congress, specifically the Administrative Procedure Act. That is, the APA never kicks in because OMB, under EO 12498 may have cut out the whole rulemaking activity.

Second, we now do know what Dr. Miller is about to do, and that is, he has now sent out a bulletin to all agency heads, dated December 23, 1985, which implements the second round of Executive

Order 12498, and he added a new section which specifically says, "Any written material or other information relating to an agency's draft regulatory program shall not be disclosed except as part of the publication." That is a new part to this implementing information.

We tried to FOIA, the Freedom of Information Act, the material that was sent to OMB; specifically the draft plans that were sent. Out of seven requests that we sent out, only one gave us back the information, and that was the Department of Agriculture. And we heard through the rumor mill that they were scolded by OMB for doing such a thing.

Now we see OMB's next step: "Any written material by the agency is not publicly reviewable."

Already we have seen that Dr. Miller has taken steps to close down public access.

Another point that has not been really mentioned today is that in this new implementing bulletin, we have, in one sense, OMB telling the agency heads that they are to comply with existing rules and regulations and priorities of the agency, but OMB adds a new section at the same time contradicting itself. What OMB says is that agency proposals must be consistent with the fiscal year 1987 budget proposal submitted by the President, not necessarily what has been approved by Congress, but simply the proposal. In an era of Gramm-Rudman, and likely the budget that is to come out next week, this could be a significant development.

Finally, let me just mention that all of this activity, Dr. Miller is accurate, does link with paperwork control. There is no doubt about that. The Paperwork Act, in fact, when passed, specifically said that it was not intended to reach into regulatory reform. However, in a report that we are releasing today called, "Eye on Paperwork: OMB Control of Government Information," which is a monthly series, we document in the month of December three examples where OMB has used paperwork powers to control the regulatory activities of EPA, the Federal Home Loan Bank Board, and the FCC. This appears to be an ongoing activity through the paperwork powers.

Last let me just comment on your bill. We have set out several recommendations in our testimony which you can review. I think that what you have done is a step in the right direction. But it is only a stopgap measure. I think that it is incumbent upon Congress to take and really look at what it wants OMB to do, and not for OMB to tell you what it wants to do.

I thank you for the opportunity to testify.

Senator **Durenberger**. Thank you very much.

Steve Kargman.

Mr. **Kargman**. Thank you, Mr. Chairman.

My name is Steven Kargman, and I am appearing in my own behalf. Thank you for inviting me to testify. I will briefly summarize my testimony, and I would like to request that my full statement be entered in the record.

Senator **Durenberger**. It will be made part of the record.

Mr. **Kargman**. I would like to discuss the implications of OMB involvement in agency rulemaking for the process of judicial review. OMB involvement in the administrative process poses a serious threat: It could erode effective judicial review of agency rulemaking. OMB involvement is not typically reflected in the administrative record submitted for judicial review. Therefore, while OMB has exercised broad de facto authority with respect to agency rulemaking, it has made itself virtually unaccountable for this involvement.

Where the courts conduct reviews on the basis of the record submitted by the agency, they may be presented with a distorted picture of how the agency reached its final decision. The courts would not see any documents reflecting communications between OMB and the agency, despite the fact that these communications represent the crux of OMB-influenced rulemakings. If the courts thus limit themselves to review on the record, they will be focusing on public proceedings which may be irrelevant and, indeed, mere window dressing to a largely OMB-determined outcome.

Nevertheless, judicial review can remain effective in the face of OMB involvement provided that the courts undertake broadened record review. Specifically, the courts should go beyond review on the record and should try to reach those interactions between OMB and the agency which may reveal the real basis for the agency's decision. I detail these various interactions between OMB and the agency and their significance for the process of judicial review in my prepared statement.

The proposed legislation, the Rulemaking Information Act of 1986, represents a serious effort to address the problems for judicial review created by OMB involvement in agency rulemaking. The bill incorporates the important notion of disclosure of the range of OMB-agency communications. To the extent that section 2 and section 3 of the bill work in practice in forcing agency disclosure, these disclosure requirements could facilitate meaningful judicial review of OMB-influenced rulemakings.

There are two overriding public policy values endangered by this undocumented OMB involvement in the administrative process: First, reasoned decisionmaking by agencies, and, second, access by all parties to the rulemaking process. Court undertaking broadened record review would help preserve these essential objectives of administrative law, objectives which were of paramount importance to the drafters of the Administrative Procedure Act.

Finally, broadened record review by the courts means that aggrieved parties challenging a rulemaking on the grounds of improper or unlawful OMB influence will not be denied an opportunity for thorough judicial scrutiny of the agency action. In the final analysis, it is the courts which must serve as the checks on arbitrary and capricious agency decisionmaking. The courts have a critical role to play in this regard where there has been significant OMB involvement in the administrative process. Broadened record review shores up this crucial judicial role, and congressionally mandated disclosure may assist the courts in undertaking this more searching review of OMB-influenced rulemakings.

Thank you.

[Prepared statements of Messrs. Guttman, Fite (with responses to written questions submitted by Senator Durenberger), Seidman (with responses to written questions submitted by Senator Durenberger), Bass (with responses to written questions submitted by Senator Durenberger), and Kargman (with responses to written questions submitted by Senator Durenberger).]

TESTIMONY OF DANIEL GUTTMAN
BEFORE THE COMMITTEE ON GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS
UNITED STATES SENATE

JANUARY 28, 1986

My name is Daniel Guttman, I am an attorney with the law firm of Spiegel & McDiarmid, in Washington, D.C. I am appearing here today as an attorney for the Service Employees International Union ("SEIU"). Most of SEIU's approximately 800,000 members work in schools, hospitals and other public and commercial buildings. SEIU is currently before a United States District Court asking that Court to order the U.S. Environmental Protection Agency to initiate a rulemaking to protect against hazardous asbestos in these buildings.

Congress is well aware of the hazards posed by friable asbestos in schools and other public and commercial buildings; it recognized them most recently in the Asbestos in Schools Hazard Abatement Act of 1984.

The House Energy and Commerce Committee has documented the heavy hand applied by OMB to prevent EPA from proceeding with EPA proposed rules to phase down and ban asbestos uses.

In SEIU's experience, OMB's role in preventing admittedly needed "asbestos in schools" rules has been both more subtle and more chilling. More subtle because the very prospect of confrontation with OMB has been sufficient to deter EPA from even proposing to exercise its rulemaking authority; more chilling because EPA simultaneously compromised its authority as a source of reliable information on National health hazards.

In Court, we have discovered that contemporaneous with the November 30, 1984 denial of our rulemaking request, responsible EPA technical staff, and, indeed, even the EPA decisionmaker himself, determined that EPA should proceed with rulemaking, and not deny it. EPA nonetheless proclaimed that rulemaking was not needed because schools and building owners were voluntarily undertaking proper action to abate hazard. As a result of Court discovery, we now know that EPA's "best judgment," which it had withheld from the public, was that most abatement action has been incompetent; in EPA's best judgement abatement actions were not only wasting untold millions of dollars, but on balance, could actually be increasing the risk of cancer. In short, the very measure by which EPA publicly proclaimed success--abatement action--was known to be a measure of failure. EPA's "expert" public proclamation that its program was working did not merely delay needed action, it covered up, and thereby compounded, waste of both money and life.

If OMB is interested in limiting "fraud, waste and abuse" within Federal control, it need look no further than the consequences of its intimidation of EPA.

Background: EPA has yet to Fulfill Commitments Made Years Ago

In the case of asbestos in buildings, EPA has yet to fulfill commitments made over six years ago.

In 1979, following a court suit, EPA agreed to develop rules to: (1) require schools to inspect for asbestos hazard; and (2) require corrective action where hazard exists. It also agreed to consider the extension of these rules to other public and commercial buildings.

In 1982 EPA did issue a rule which required schools to perform a one-time inspection for friable asbestos-containing materials, and report the results to parents, teachers, and employees. It has never, however, proposed a rule(s) that would require corrective action where school hazard exists, or proposed a rule that would require inspection for hazard in "other" public and commercial buildings.

In November, 1983 SEIU therefore petitioned EPA (under the Citizens' Petition provision of the Toxic Substances Control Act) to initiate a rulemaking to complete its 1979 commitments to: (1) provide standards for corrective action in schools and to require action when needed; (2) provide rules to protect life during abatement; and (3) extend its school rules to "other" public and commercial buildings.

In early 1984 EPA purported to "grant" SEIU's petition. At public hearings held in the spring of 1984 more than 150 witnesses provided virtually unanimous testimony that EPA's asbestos program (which consisted essentially of the inspection rule and a technical assistance program that distributed "guidance" documents) was not working and that rulemaking was needed. Those testifying on behalf of some or all of the rules sought by SEIU (but since denied by EPA) included unions, PTA and citizens' groups, health and environmental associations, medical experts, and even asbestos industry groups. 1/

In September 1984, when it appeared that EPA was delaying action on SEIU's "granted" rulemaking requests, SEIU sought a court order that EPA act quickly. After SEIU's Court filing, EPA promised the Court that it would provide a final decision on the future development of its asbestos program by November 30. In a November 30, 1984 letter to SEIU, Dr. John Moore, EPA Assistant Administrator for Pesticides and Toxic Substances, announced that, with the exception of rules to protect building occupants and workers during the performance of abatement activities, EPA did not believe further rules were needed. EPA's "decision" stated that it agreed with SEIU that asbestos in buildings poses a National health risk; but rules were not needed because localities are acting voluntarily to properly abate that risk. It is now evident that the decision was a sham; EPA knew that its program was not working, and knew that rulemaking was needed.

1/ As summarized by a contractor for EPA:

> "Virtually all of the comments received on the SEIU recommendations [for a rule setting abatement standards] were supportive. The commentors described how without standards there has been widespread disagreement following asbestos inspection leading both to the performance of unnecessary abatement

[FOOTNOTE CONTINUED ON NEXT PAGE]

EPA's November 30, 1984 Public "Decision" to Deny Rulemaking Was Contradicted by its own Contemporaneous Expert Conclusion

SEIU's Court discovery revealed that up until virtually the last moment, responsible EPA technical staff, and, indeed, the decisionmaker (Dr. Moore) himself, were in agreement that EPA should proceed with rulemaking. EPA's determination to reject the judgment of its experts was made in the absence of any new study or information about the asbestos hazard. These facts were confirmed by discovery documents obtained by SEIU and the deposition of Mr. John Rigby, the principal staff author of the November 30 letter. 2/ Thus:

1. In mid-October 1984 EPA staff assigned the job of preparing the November 30 SEIU response, recommended that EPA proceed with, inter alia; (a) a rule to require schools with asbestos to make and implement abatement decisions after review by a qualified expert; and (b) an amendment to the existing school inspection rule to require periodic reinspection.

2. In a November 7 memo to EPA Deputy Administrator Alvin Alm, Dr. Moore recommended that the November 30 response to SEIU state that: (a) EPA will issue an immediately effective

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[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
activities and to inactivity in cases where abatement is unnecessary."

2/ The available details of EPA's reversal of position, with reference to supporting documentation, were summarized by SEIU in its July 22, 1985 Court response to EPA's summary judgment request. The pleading has been provided separately to the Committee.

worker protection rule by June 1985; and (b) EPA will propose, by August 1985, a rule to require:

> "...periodic reinspection and reporting for friable asbestos containing materials in schools. If friable asbestos is found, schools would be required to develop and implement an abatement plan..."

Dr. Moore further recommended that EPA issue, by June, 1985, an Advanced Notice of Proposed Rulemaking in response to SEIU's request for rulemaking regarding asbestos in other (non-school) public and commercial buildings.

3. At a November 14, 1984 meeting EPA Deputy Administrator Alvin Alm approved Dr. Moore's recommendation to proceed with school rules. This decision was summarized in a November 15 "Deputy Administrator's Asbestos Rules Decisions" memorandum.

4. The November 19, 1984 draft of the November 30 letter stated that EPA would proceed with the schools rulemaking sought by SEIU and evidently agreed to by Mr. Alm, Dr. Moore, and Dr. Moore's staff.

5. On November 20 Dr. Moore met with his staff. At that meeting, as testified to by EPA staffer John Rigby, Dr. Moore stated that EPA would not proceed with rulemaking.

6. Between November 15 and November 20 EPA came into possession of no new facts relating to the asbestos hazard.

In sum, after review of all relevant information, responsible EPA technical staff, the putative decisionmaker (Dr.

Moore), and Dr. Moore's superior (Deputy Administrator Alm) recommended that EPA go ahead with the school rules sought by SEIU. Inexplicably, and without any new facts, EPA flip-flopped.

As evidence of its decision-making "process" has come to light, EPA has conceded to Congress that its November 30, 1984 "decision" denying SEIU's rulemaking requests was not what it purported to be.

In June, 1985 Dr. Moore was questioned about the November, 1984 decision-making in hearings before Congressman Florio's Subcommittee on Transportation, Commerce, and Tourism. Dr. Moore explained that EPA did not decide, as the November 30 letter plainly stated, that rules were not needed because EPA's program is working. Rather, EPA's decision was that, given available resources, EPA would "defer" action on the rules sought by SEIU, and reconsider them in the summer or fall of 1985.

In an October 25, 1985 letter to Chairman Florio, Dr. Moore now says that EPA is considering a school reinspection and abatement plan rule, which it had ostensibly found unnecessary in November, 1984; EPA now promises to come to a decision on this concept by the spring of 1986. (EPA's October 25 letter, however, made no comment on EPA's rulemaking intentions regarding "other" (non-school) public and commercial buildings.)

If, in November of 1984, EPA had told the public (and the Court) that rulemaking was desirable, but its resources were limited, its behavior would have "merely" been that of footdragging indecisiveness; EPA's active misrepresentation transformed a questionable decision into a public health hazard.

EPA Justified Inaction by the Tragically False Claim that its Program Was Working

EPA's November 30, 1984 "decision" that further rules were not needed, EPA said, rested on its belief that many thousands of schools were actually undertaking abatement activities. The decision, however, did not cite any data on the quality of abatement.

In testimony before EPA, medical experts, as well as numerous lay witnesses, told EPA that, because of incompetent abatement, schools were not only wasting scarce educational dollars, but could actually be increasing risk. For example, Dr. Robert Sawyer, a longstanding technical consultant to EPA, stated his concern that, because of improper abatement, EPA's program "will cause more adverse health effects, including malignancies, than it can ever prevent."

SEIU's Court discovery revealed that EPA, 3/ while claiming its program was working, had withheld from the public a poll of its top field staff stating their belief that less than 25% of abatement activities were done competently, and their concern that improper abatement was actually increasing risk.

3/ Documentation for the evidence cited above is identified in SEIU's July 22, 1985 court pleading, a copy of which has been supplied to the Committee.

In the Spring of 1984, EPA polled its regional officials at a "National Meeting" of EPA's asbestos program. As Dr. Moore summarized in a memo to Deputy Administrator Alm:

> "When the Regional Asbestos Coordinators (RACs) were polled recently, based on their field experience, they stated their belief that less than 25 percent of all asbestos abatement projects are performed in accordance with the procedures discussed in the OTS [Office of Toxic Substances] guidance document."

As a further internal document, also withheld from the public until discovered in Court, recorded:

> "The National Meeting attendees were concerned that poor abatement contractor performance is creating greater exposure and worse health risk than if asbestos is left in place and unabated."

The deposition of the principal staff author of the November 30 decision revealed that, (1) the field staff poll represented EPA's "best judgment" on the quality of abatement, (2) EPA had not undertaken to investigate, much less rebut public testimony and its own staff's concern that its program was, on balance, causing more cancer than it was preventing, and (3) EPA had no study or analysis which would show that its program is, on balance, curing rather than killing.

SEIU's Court discovery further confirmed that the majority of schools had not even complied with EPA's inspection rule; in particular, there has been systematic failure to inspect for asbestos in boiler rooms, where it is frequently located. 4/ Thus, EPA's representation that its program was working to produce proper abatement was not only in neglect of its own best evidence that most abatement was improper, but in neglect of further evidence that untold thousands of schools had not even found hazard, and could hardly be abating it.

SEIU notes that, in the fall of 1984, EPA was misrepresenting the facts to Congress, no less than to the Court and SEIU. 5/

4/ An EPA budget office memo explained that:

> "If noncompliance rate doesn't drop below 15 percent, too many LEAs [Local Education Agencies] will be in violation hence, too many children still at risk."

While publicly claiming its program was working, EPA's contractor survey and EPA compliance monitors were finding a noncompliance rate of well over 50%.

5/ In September 26, 1984 testimony before the Florio Subcommittee, for example, Dr. Moore stated:

> "Our school program is working. Asbestos is being abated from schools where it poses potential hazards and, as a result, our school children are being protected. This is evident from a survey completed almost 1 year ago that provides a valid assessment of compliance with the asbestos-in-schools rule, as well as what schools are doing to abate asbestos that is identified. Preliminary results indicate that the vast majority of schools are conducting asbestos inspection..."

In fact, in September, 1984 EPA's "best evidence" was that most abatement work was not being performed properly. In September 1984, EPA did not have evidence that, as testified to by Dr. Moore, abatement actions are preventing more cancers than they are causing. (The survey referred to did not consider the

[FOOTNOTE CONTINUED ON NEXT PAGE]

EPA's November 30, 1984 denial of rulemaking did more than delay needed action. EPA justified inaction by telling the public that ongoing activities were successful, when it knew that they may well be increasing risk. By falsely claiming that hazard was being properly abated, EPA both discouraged action (such as reinspection) that would have shown that it was not, and encouraged abatement activities that could well further increase hazard.

Where EPA's Integrity has Vanished, OMB's Thumbprints are to be Found

The Department of Justice has strenuously resisted SEIU's efforts to obtain Court discovery of OMB's role in EPA's decisionmaking. We do not yet know the full facts. 6/ There is ample evidence, however, that fearing confrontation with OMB, EPA has compromised not only its decisional responsibility, but its responsibility and authority as a source of reliable information on National health hazards. Thus:

1. Dr. Moore, in June, 1985 testimony before the Florio subcommittee, stated that EPA's seemingly inexplicable November,

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[FOOTNOTE CONTINUED FROM PRECEDING PAGE]
quality of abatement.) Moreover, EPA's claim that the vast majority of schools were conducting inspections was extraordinarily misleading where the very survey referred to by EPA concluded that nearly 90% of Local Education Agencies were in violation of EPA's inspection rule.

6/ The facts summarized above are detailed, with supporting documentation, in SEIU's July 25, 1985 "Response" in Opposition to EPA's Motion to Quash the Subpoena of OMB Official David Gibbons. A copy of the pleading has been supplied to the Committee.

1984 reversal of course was of its own volition. Where EPA's rationality vanished, however, OMB's thumbprints may be found. Documents show that:

(a) EPA required OMB's approval to proceed with the rulemaking recommendations of Dr. Moore and his staff; EPA sought this approval contemporaneously with the decision to reverse course; 7/

(b) the notes of the November 14 decision meeting involving Dr. Moore and EPA Deputy Administrator Alm, recorded Mr. Alm as stating: 8/

> "Standards. We are doing this as part of Abdnor [Abatement Act of 1984] right; don't have to make decision on rules, get OMB pissed off right now, avoid unnecessary provocation."

(c) a memo by a responsible EPA official (the Assistant to the Director of the Office of Toxic Substances), recorded that "OMB will not clear by the 30th." 9/

At the time of the flip-flop, we now know, OMB was directly repelling EPA's proposed asbestos ban and phase down rules; EPA evidently pulled its punches on further asbestos rulemaking to "avoid unnecessary provocation" of OMB.

2. There is evidence that EPA's limited public commitment to rulemaking was contradicted by a secret, ex parte agreement between EPA and OMB.

7/ See Attachment 5 to SEIU's July 25, 1985 pleading.

8/ See, Attachment 3 to SEIU's July 25, 1985 pleading.

9/ See Attachment 4 to SEIU's July 25, 1985 pleading.

While otherwise denying rulemaking, EPA's November 30, 1984 decision stated that EPA agreed that there was merit to SEIU's proposal for rules to protect human life during abatement. EPA stated that by June 1985 it would either propose rules to protect (1) abatement workers, and (2) other building occupants, or explain why such rules would not be proposed. EPA has yet, however, to fulfill this express commitment to SEIU and the Court.

In May 1985 EPA evidently went to OMB to obtain approval of its proposed worker protection rule. An EPA memo recorded that meeting. 10/ The memo stated that OMB's David Gibbons told EPA that OMB had a secret agreement with EPA "not to worry about the November 30 response to SEIU and that EPA would not proceed with rulemaking." A June 14, 1985 Washington Post article 11/ reported that, even as EPA officials denied such agreement, OMB confirmed it.

The government has told the Court that no secret agreement could have existed because, in July, 1985 EPA proceeded to issue an immediately effective proposed worker protection rule. It is hardly surprising that, when faced with Court, Congressional, and press scrutiny, EPA and OMB have decided to issue the worker protection rule. That they have done so is hardly proof that impropriety was not present. This is

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10/ See Attachment 1 to SEIU's July 25, 1985 pleading.

11/ See Attachment 2 to SEIU's July 25, 1985 pleading.

especially so where EPA has still not fulfilled its November 30, 1984 commitment to act, by June, 1985, on an "occupant protection" rule.

3. There is evidence that a central commitment contained in EPA's November 30, 1984 decision was simultaneously countermanded by secret, *ex parte*, directive from OMB. In explaining that further rulemaking is not needed, EPA claimed that "technical assistance" will be sufficient to alleviate the need for rules. EPA told the Court that in its November 30, 1984 decision it decided that (emphasis added):

> *EPA plans to expand its program to ensure* that owners and operators of schools and other public and commercial buildings have the *necessary technical assistance*...

EPA's November 30 "decision," however, conspicuously failed to reflect any budget commitments beyond fiscal year 1985. EPA Deposition testimony revealed that OMB expressly directed EPA to delete any such commitments from the final version of the letter. Mr. John Rigby, the principal staff author of EPA's November 30 decision, testified that,

> OMB did not want us to commit to doing certain things which had a financial impact, more the technical assistance even, rather than regulatory.... 12/

Thus, EPA's public promise that needed technical assistance will be "ensured" was flatly contradicted by OMB in *ex parte* communications that are nowhere reflected in EPA's "Administrative Record."

12/ *See* Attachment 6 to SEIU's July 25, 1985 pleading.

Conclusion

In 1979, when EPA initially committed to regulate asbestos in buildings, EPA's best estimate was that friable asbestos was contained in approximately 10,000 schools housing 3,000,000 students. Today, EPA's "best estimate" is that asbestos has been found in over 30,000 schools occupied by 15,000,000 students, 13/ and over 700,000 other public and commercial buildings occupied by many millions. EPA, however, has yet to fulfill its 1979 commitment.

SEIU's experience in seeking to compel EPA to fulfill its statutory obligations to regulate asbestos in buildings compels several observations about the nature and consequences of OMB's domination of EPA's spirit.

First, the consequences of OMB intimidation are not a partisan issue. Virtually all of EPA's constituencies--including PTAs, teacher and worker unions, environmental groups, medical experts, the National Governors' Association, and even asbestos

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13/ EPA's publicly used estimate is itself likely a substantial underestimate. The estimate was derived by extrapolation from the number of schools that told an EPA contractor, in a 1984 telephone survey, that they had found friable asbestos. When the contractor undertook an on-site visit to check the accuracy of telephone reports, it found that 25 out of 90 schools visited failed to identify friable material that was present. In particular, there was a systematic failure to check for boiler room asbestos. Based on this finding, the contractor report to EPA made plain that the "30,000 schools" estimate was an understatement. In Court, SEIU has discovered that EPA's field staff have independently told EPA that systematic failure to identify boiler room asbestos is a "time bomb." EPA's public pronouncements have typically ignored its contractor's qualification, and its field staff's warnings.

industry groups--are urging EPA to proceed with the rulemaking it has denied. The proponents of action sit on one end of the log, along, it appears, with EPA's expert staff; the shell of the Agency rests alone on the other.

Second, EPA has not only failed to proceed with rulemaking it knows is needed, it has withheld from the public, and actually misrepresented, its best expert judgment on a national health hazard. 14/ A lawsuit was required simply to obtain EPA's expert judgement (and much further evidence), that its program was not working, and was likely causing cancer.

Third, even in Court EPA has shown shamelessly little concern for Congressional mandate.

In Court, for example, SEIU has argued that EPA's refusal to proceed with rulemaking for non-school buildings is clearly unlawful where EPA has little evidence of efforts to even identify hazard, but estimates that it is present in over 700,000 buildings. In response, EPA has chided SEIU for misunderstanding its position.

EPA, in a September 1985 pleading, has now explained that its decision not to proceed with rulemaking in the case of "other" (non-school) public and commercial buildings was not

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14/ The documents EPA withheld from the public until Court discovery included not only memos showing EPA's own best judgment, but a contractor "cost and effectiveness" survey which indicated (1) that, by EPA's cost-benefit logic, proper abatement is a good investment; and (2) that, if abatement is improper to the extent indicated by EPA staff, EPA's program would, on balance, be causing cancer.

based on the conclusion that its program was successfully reducing risk, but on the conclusion that the problem is so large as to be "intractable." The Toxic Substances Control Act, of course, requires that EPA issue rules where "unreasonable risk" is present; it does not permit EPA to avoid its obligation by claiming risk is "too big."

Finally, and most importantly, EPA and OMB have corrupted the very principles in whose name they would ignore Congress' mandate and the public's outcry.

SEIU has been repeatedly told by EPA that, whatever Congress' mandate, the "appropriate" Federal response to National health hazards is the provision of information, and not regulation. If information were sufficient, SEIU would not seek rulemaking. Information can hardly be adequate, SEIU respectfully suggests, when an expert agency is not able to tell the truth, as it sees it, about an admitted National health hazard.

SEIU has also been further and repeatedly advised that it is unreasonable for the public to ask for regulation because regulations cannot meet the "cost/benefit" tests required in our budget conscious age. In the case of asbestos in buildings, however, there is no dispute that action should be taken, and monies spent, to address hazard; the question is whether or not the action that has been taken has been well taken, and whether or not further action will be wasteful as well. Governmental action which covers up hazard and waste, and thereby guarantees future hazard and waste (in the process potentially exposing the Federal Treasury itself to future negligence claims) cannot, SEIU respectfully suggests, be justified on any hardheaded economic basis.

WE HAVE A RIGHT TO BREATHE!
WLA
WHITE LUNG ASSOCIATION
National Non-Profit Asbestos Victims Organization
1114 Cathedral Street, Baltimore, Maryland 21201 (301) 727-6029

TESTIMONY OF

JAMES FITE, EXECUTIVE DIRECTOR

OF

THE WHITE LUNG ASSOCIATION

BEFORE

THE SENATE SUB-COMMITTEE ON INTER GOVERNMENTAL RELATIONS

JANUARY 28, 1986

A National Asbestos Victims Organization

Senator Roth, Senator Durenberger and members of the Senate Sub-committee on Intergovernmental Relations:

My name is James Fite. I reside at 3030 Barclay Street, Baltimore, Maryland 21218. Today I am representing the White Lung Association in my capacity as executive directory. I speak from my own personal experience and from work and consultation with injured and diseased workers throughout the United States, including members of the Breath of Life Organizing Campaign. The Breath of Life Organizing Campaign (BLOC) is a coalition of the Black Lung Association (coal miners who are victims of pneumoconiosis), the Brown Lung Association (cotton textile workers who are vicims of byssinosis) and the White Lung Association (the asbestos victims' association). I serve as treasurer of BLOC.

I was exposed to heavy amounts of airborne asbestos during my work as a marine machinist and a carpenter. During the course of my activity with the White Lung Association over the last six years, I have encountered thousands of cases where individuals, both in the workplace and in their living environment, were exposed to asbestos. During the course of our activity to educate the public about this toxin and to assist them in preventing exposure to asbestos, we have noted a common thread in each case. This common thread is the lack of resolve to effectively regulate asestos exposure by those federal and state agencies which have been mandated to do so.

Asbestos is more studied than any other single particulate toxin. Its fibers are unique, not only because of their extraordinary toxicity, but also due to the fact that pollution of our society by asbestos is so wide spread that it endangers public health on a scale far exceeding that of the workplace. For years victims' representatives, including myself, have been asked to testity before Congress and state legislatures concerning this problem. It is ironic to note that until about 18 months ago, the asbestos industry and the insurance industry also appeared often to testity, but always to the fact that asbestos was not so dangerous. Unfortunately, federal agencies, such as the Occupational Health and Safety Administration and the Environmental Protection Agency, have paid more attention to the needs of the toxin manufacturers and their insurance agents, than they have to public health. The proof of this is the dismal regulatory record which began with OSHA's adoption of the 2 fiber per cubic centimeter standard, which the asbestos industry suggested. This standard allows the worker to breath two million fibers per hour.

Each year the scientific community produces more evidence about the harm asbestos is causing to our society. Just last year researchers from the Pathology Department at the University of Texas in Galveston, reported that autopsies performed on infants who died before the age of one year, showed that a high percentage of these babies' lungs were heavily contaminated with asbestos fibers. The incubator manufacturers are now already sending out warnings to hospitals concerning potential asbestos contamination from incubators. This action, and other self-regulatory activity on the part of manufacturers who utilize asbestos, is the result of their fear of law suits and not the result of regulation.

In fact, the recent EPA announcement to ban asbestos products in the US is not leading the fight against this toxin, but merely adjusting the regulations to reflect the fact that industry is moving away from asbestos usage for fear of law suits. The leader of the asbestos industry, the Manville Corportation, in conjunction with several other companies, is making every effort to get out of the asbestos business. Many manufacturers presently use the fact that their product is "asbestos free" as a marketing device. Many states are considering policies which would prevent the future purchase of any asbestos containing material. Even those products which are currently free from regulation, such as asbestos concrete pipe, are being removed from use. Woodstock, N.Y. recently provided an expensive example of this in their undertaking a massive project of replacing their water pipe system. There is a mad scramble amongst public and private building owners to identify those companies who sold them asbestos containing materials so that the sellers can be sued. Countries such as Denmark and Sweden have banned asbestos and suitable substitutes of asbestos have been marketed throughout the world and in the US.

Failure to properly regulate this toxin is one of the leading factors in the current insurance crisis which grips our country. Ignoring the pleas and studies of scientists for the last 10 years, the EPA has issued regulations written by and in consultation with the asbestos industry. By 1973, it was obvious even to the industry, that the spraying of asbestos thermal insulation into building air circulation vents and return plenums would produce liability. They agreed to stop the process of thermal spray in 1973, but requested and received permission to continue to spray asbestos on people's ceilings as a decorative material. This practice continued until the stock piles were deleted and only then was it banned in 1979.

Diseases caused by asbestos exposure and the contamination of the buildings with asbestos containing materials will cost society far more than the total worth of the asbestos industry and their insurance companies. This fact is recognized by the insurance companies and the result is their refusal to insure asbetos abatement contractors or any other asbestos related project. We expect soon that building owners whose buildings are known to be heavily polluted will be unable to obtain liability insurance. The recent problems encountered by local government in obtaining liability insurance are in a great part due to the fact that these governments are beginning to be held responsible in the courts for failure to protect citizens from asbetos exposure in schools and other public buildings. The insurance industry is trying to do what comes naturally to them, that is, to limit their liability for policies that they write. The blackmail being practiced by the insurance industry to force limitations on tort liability through legislative means, is a crude and ineffectual form of regulation. However it is currently more effective than any actions currently undertaken by federal agencies.

Failure to regulate asbestos properly has given us a clear example of the harm and expense society must endure when government regulation is blunted either by special interests in the private sector or by interference from federal agency interaction.

It is estimated that there will be much more expense to building owners than the present 80 billion dollars in damages currently claimed by property owners and municipalities.

As for the victims of asbestos exposure, the governments own documents clearly point out that the majority of the expense for care of asbestos victims is paid for by the tax-payers. In addition, I would like to submit the conclusions of the Interim Report To Congress on Occupational Diseases and Disability Compensation for Asbestos-associated Disease in the United States. These documents show that the taxpayers are already footing the bill for the disease caused by the asbestos industry as most asbestos victims are maintained on social security and veterans programs.

For further information we are submitting a copy of *The Costs of Asbestos-Associated Disease and Death* by William G. Johnson and Edward Heler. Their work was published in 1983 in the *Milbank Memorial Fund Quarterly, Health and Society*. The conclusion states:

CONCLUSIONS

Asbestos exposure has been killing workers for more than sixty years. Even if exposures were eliminated, exposures during the period from 1940 to 1979 will result in 315 thousand deaths by 2027. The experience of insulation workers who died from asbestos between 1967 and 1979 indicates that the average gross loss per death is $214,910 ($252,331). If these averages are applied to asbestos related deaths in other occupations, the total gross loss from death between 1967 and 1979 is $17.1 billion dollars. The deaths that occur between the years 1979 through 2027 will add $309.3 billion dollars to this total. The total cost of asbestos related death is higher by an amount equal to the costs of medical care, litigation costs and the administrative costs incurred by social agencies that cope with the problems of the workers' survivors. None of these costs are included in our estimates. The bill for the human costs of nearly 40 years of asbestos exposure, therefore, is a figure well in excess of the 326 billion dollars that we estimate.

The question of who has and who will pay these costs is important for the workers' families. It is also an important determinant of incentives for the prevention of death from asbestos. The method of compensation that will provide an optimal set of incentives for prevention cannot be determined from this study. The results, however, do describe a situation which is not likely to be optimal. The current approaches to compensation impose more than two-thirds of the private costs of disability and death on the widows of the workers. The adequacy of compensation varies widely within this group with differences in access to tort suit awards, Workers' Compensation and social insurance. Whatever the reasons for these differences, the fundamental fact is that the current approaches to compensation do not provide adequate benefits for the losses that these families have suffered.

We have said little concerning the pain and suffering of the workers and of their families because these costs are not measurable. The concept of such losses, however, is not foreign to economic analysis and it should be understood that their omission simply supports our contention that our estimates are conservative.

The tragedy of the asbestos experience is that generations of workers have been subjected to an unnecessarily large risk of disability and death and they and their survivors have not been adequately compensated for their pecuniary losses. Unless we fully understand the true costs of asbestos, the reasons for the failure of the compensation system, and the relationship between compensation and incentives for prevention, the tragedy will probably be repeated for workers who deal with other toxic substances in the workplace.

In the face of such overwhelming realities the failure to regulate this toxin properly, regardless of the reason, is a public tragedy worthy of moral outrage. The Office of Management and Budget's interference with the regulatory process has pushed us further from the solution. For OMB to interfere with EPA is like dropping a refrigerator on a drowning child. The child needs help, but not that kind. If anyone in government is sincerely interested in finding out the cost of the asbestos tragedy, they could start with reviewing how much social security spending goes to care for asbestos victims.

The cost of wide-spread human suffering from asbestos exposure is primarly borne by the taxpayers. We are all being victimized by the lack of past regulation. Some of us by incurable disease, some by lost wages, some by lost loved ones, some by lost budgets. In fact, the situation is now so out of control that there are those who are recommending the restrictions of civil court freedoms so that business as usual can continue.

Tens of thousands of asbestos victims throughout the United States urge you to consider carefully the costs of the failure to regulate. Past exposure to asbestos has already cost our country billions of dollars in lost wages and taxes and has cost the workers who were exposed not only their livlihood, but also their lives.

We thank you for inviting our comments and for you consideration of them.

RESPONSES OF MR. FITE TO WRITTEN QUESTIONS SUBMITTED BY SENATOR DURENBERGER

Mr. Fite, as you may know, the primary issue that led OMB to hold up the asbestos phase out regulations involved how to measure the value of human life when calculating the costs and benefits of health and safety regulations. The very idea seems awfully callous, but apparently EPA has developed a methodology derived from the insurance industry. I think they used a figure of about a million dollars, based on the expected earnings and so forth of an average lifetime. Apparently, OMB had problems with this standard figure, arguing that persons exposed to asbestos don't develop cancer for many years after, and therefore the benefits of saving their lives by regulations should be "discounted" accordingly.

What do you think of this argument?

Do you think that the lives of asbestos victims ought to be discounted in this way, or do you have some problems with this kind of logic?

WLA
WHITE LUNG ASSOCIATION
Asbestos Abatement Technical Information Center
1114 Cathedral Street, Baltimore, Maryland 21201 (301) 396-1486

March 11, 1986

Senator Dave Durenberger, Chairman
Subcommittee on Intergovernmetal Relations
U.S. Senate
Washington, D.C. 20510

Dear Senator Durenberger,

Thank you for requesting the opinion of the White Lung Association of the role of Office of Management and Budget's role in the regulatory review process.

In response to the OMB position that lives should be discounted in order to understand the true value of regulation we wish to submitt the following response.

Material we submitted with our written comments included an essay entitled "The Costs of ASbestos-Associated Disease and Death", in addition to studies done for Congress by OSHA and by Dr. Selikoff.

These documents make the point that work related deaths cost on the average from $250,000.00 to over $350,000.00. This is calculated from wage lost and other economic hardships suffered by real cases. In other words, the individuals used to make these projections were real people with real asbestos related disease and these were the real costs.

What all of these reports mention, a point the OMB fails to consider, is the tremendous social cost of increased welfare, compensation programs and social security. Each study is careful to note that workers compenstation and third party suits do not pay for the full cost of the economic loss and these costs are absorbed by the social services provided by government.

Any sincere attempt to analyze these costs must include the increased costs of social security and other programs.

I am including the statement of Edward Woodward, assistant general manager, California workers' Compensation Institute, made before the US senate subcommittee on labor, April 30, 1984. This illustrates the sad fact that most asbestos victims cannot get compensation because they are not disabled enough in the opinion of the compensatory agencies.

The asbestos victim is left in the middle, no employer wants to hire someone with past asbestos exposure because they fear future compensation suits. The disease may progress for years before the compensatory system considers the victim disabled. Once the individual is told they have some disability, most compensatory systems impose a statue of limitations, which begins then. With a disease that take from 5 to 40 years to manifest clear disability, the statue frequently runs before the disease progresses enough to claim compensation.

In addition, on must consider if loss of wages is all that should be compensated for. Not only has the victim lost wages but also much of the beauty and activity of life is denied them due to their condition.

Finally, there is a great deal of public exposure due to asbestos in buildings. EPA regulations could go along way in reducing this exposure and the resulting disease. There is no national registry of mesothelioma victims and therefore it is difficult to determine the exact amount of lives saved. However medical science does recognize that mesothelioma is increasing amongst the population at rates hundreds of times above those found in the 1940's and early '50's.

In addition to the work place and environmental exposure one would want to calculate the expense of asbestos removal from buildings. In Maryland alone, over 7 million dollars were spent in1984 to remove asbestos. Had regulations been in effect before this material was put in, it would not have to have been taken out.

The asbestos problem is not being viewed by OMB in its entirety, if it were, they would not quibble about regulations. Regulations, even at this late date could prevent a whole new generation of asbestos victims which will be created by the uncontrolled removal of this substance.

Please contact us if we can be of further assistance and thanks again for considering our opinions.

Sincerely,

James Fite, Executive Director

DCA

May 21, 1984

Mr. James Fite
White Lung, Inc.
1114 Cathedral Avenue
Baltimore, MD 21201

Dear Jim:

It was good to talk to you and your associate by phone last Friday about the Long Beach Naval Shipyard asbestos study and the hearings last month by the Senate Labor Subcommittee.

I am enclosing all of the testimony for both days of these hearings, since I didn't know which statements you might be particularly interested in besides the one that I mentioned by Edward C. Woodward of the California Workers' Compensation Institute. Feel free to make copies of any you wish for your own files and return my copies in the enclosed addressed envelope. The Subcommittee has exhausted its supply of copies of all of the witnesses' statements or I would give you my set and get another.

Your comments on Woodward's remarks with respect to the Long Beach shipyard workers' examination results would be appreciated. I'll look forward to working with you in the future. Best wishes and good luck in your important work,

Sincerely,

Bill

William G. Phillips
Legislative Consultant
Metal Trades Department,
AFL-CIO

WGP/c
Enclosure

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REMARKS OF EDWARD C. WOODWARD, ASSISTANT GENERAL MANAGER, CALIFORNIA WORKERS' COMPENSATION INSTITUTE, BEFORE THE U.S. SENATE SUBCOMMITTEE ON LABOR, April 30, 1984

My name is Ed Woodward. I am the assistant general manager of the California Workers' Compensation Institute, a San Francisco-based non-profit research organization whose member-insurers write and service about 95 per cent of statewide workers' compensation premiums. Prior to joining the Institute, I served as Assistant Deputy Commissioner of the U.S. Department of Labor with responsibility for administering workers' compensation claims of federal employees in California, Arizona and Nevada under the Federal Employees Compensation Act.

My remarks today will summarize the results of two efforts - one state, the other federal - to provide a prompt and effective workers' compensation remedy for workers exposed to asbestos. Both efforts at improving workers' compensation programs were constructed on the following perceptions. First, there was a significant population of workers suffering impairment, disability or death due to asbestos. Second, workers' compensation benefits were being delayed or denied to asbestos-exposed workers -- suposedly because of anachronistic statutes, burdensome regulations and ineffective administration. Third, the problems inherent in the workers' compensation programs were forcing workers to seek recovery under tort liability.

The results of these efforts to correct perceived workers' compensation deficiencies provide an opportunity to evaluate the validity of the assumptions, offer a perspective on the nature and scope of the so-called "asbestos crisis" and may be instructive in providing an insight into the relationship between workers' compensation and the tort system.

Occupational disease claims are a relatively small part of workers' compensation. For example, occupational diseases accounted for only 5 per cent of all "disabling" injuries, i.e., one or more days lost time, in 1980, according to the California Division of Labor Statistics and Research. Put another way, only one of every 1,000 fulltime employees covered by the California workers' compensation law were affected by a disabling occupational illness in 1981.

These statistics are consistent with results of a pertinent Institute study that limited the definition of occupational disease to disorders attributable to job-related inhalation, absorption, ingestion or contact with a toxic substance. On that basis, occupational disease claims in the first quarter of 1981 accounted for only 1.6 per cent of all disabling injuries. And only one in six of that number, or 0.26 per cent of all claims, involved asbestos exposure.

However, even with this low incidence, the resolution of claims for workers affected by asbestos-related conditions was time consuming. Lengthy disputes were frequently the case -- not over existence of the disorder but, rather, attempting to determine which of several employers were liable. So in 1979 the California Legislature created a $2.6 million revolving account to provide temporary disability and medical benefits to asbestos victims while the state adjudicatory agency was determining liability.

The Account began operation January 1, 1981. On November 20, 1981 the legislature held oversight hearings. Testimony at the hearing documented that after almost one year of operation the program had identified 498 potential claimants for aid from the fund. However, there were only 12 qualified applicants, of which 10 had been paid a total of $19,500. Additionally, the annual cost to administer the fund was $125,000.

According to testimony at the hearings, the road blocks to more widespread utilization of the fund were its limitation to temporary disability and medical benefits. Counsel for potential recipients argued most victims of asbestos were not "temporarily disabled". Further, claimants attorneys contended the requirement that the applicant submit to an independent medical examination made them reluctant to avail themselves of the fund because the medical reports would impact concurrent third-party litigation negatively -- even though the law prohibited these reports from being used as evidence in a civil suit. Nevertheless, these attorneys testified they feared the reports would be subpoened at settlement hearings.

In response to these hearings the legislature amended the law to provide that the account would pay for permanent total disability and death benefits as well as temporary disability and medical benefits. The legislation also deleted the requirement for an independent medical examination if "adequate" medical evidence was presented.

The results of the program from January 1, 1981 thru December 31, 1983 - a three year period - are as follows.

- A grand total of 37 cases have been accepted and benefits provided at a cost of $274,000.
- Half the cases accepted were for medical benefits only.
- Only three cases involved payment of permanent disability benefits.
- Only one death claim was allowed (which subsequently was established by autopsy to be unrealted to asbestos).

Despite these legislative efforts, the program is only accepting twelve cases per year at an average cost of approximately $7,000 per case. Before examining possible reasons for these apparently anomalous results, it may be instructive to examine the comparable experience of the Federal Employees Compensation Program in San Francisco.

In the late 70's the Department of the Navy initiated a program to conduct massive X-ray screenings to determine the existence and extent of asbestos-related disease among shipyard workers. The results of this screening program were disturbing: On initial screening, 30 per cent of Long Beach Naval Shipyard workers showed X-ray abnormalities consistent with asbestos exposure. These findings, coupled with a great deal of attendant publicity about asbestos hazards, resulted in an influx of more than 2,000 claims from shipyard workers in the FECA San Francisco office.

Under FECA the burden of proof is on the employee in occupational disease claims to prove -- "through substantial probitive evidence" -- the existence of disability and that the employment was the proximate cause of the impairment or disability. The employee's difficulty in obtaining documented exposure data, medical histories and employment records for the previous 20-30 years, along with the requirement to provide sophisiticated and expensive medical evidence establishing proximate cause proved a virtually impenetrable barrier for asbestos-exposed shipyard workers.

Consequently, an administrative decision was made to abandon the burden of proof for asbestos claims. Instead the federal government assumed the burden.

To implement this decision, a special program was developed in conjunction with pulmonary experts from university-affiliated hospitals and medical centers for the processing and handling of asbestos claims. The program was structured so that after an asbestos claim was filed with FECA, the claimant was referred to one of the designated medical centers for examination and evaluation.

The evaluation included completion of an extensive questionnaire (based on a common protocol) describing the claimant's occupational and medical history, including a description of the frequency degree and duration of exposure to asbestos. Additionally, the claimant underwent a comprehensive medical examination that included chest x-rays, pulmonary functions studies, electrocardiogram testing, as well as carbon monoxide difusion and arterial gas studies.

All reports and test results along with the physician's diagnosis and recommendations then were reviewed by another independent medical pulmonary specialist to insure consistency and quality. If the medical evidence found any impairment, disability or death due to asbestos exposure in federal employment, the claim was accepted and benefits paid. The program didn't recognize apportionment, either to other employments or other conditions, and all mesothelioma, lung cancers and brocogenic cancers were deemed compensable. Additionally, the questionnaire completed by the claimant, including employment and exposure history to asbestos, was accepted as factual. In short, every effort was made to pay, rather than reject claims.

The results of this program:

- There was no evidence of the existence of asbestos-related disease in 30 per cent of the cases and, accordingly, no benefits were paid.

- 57 per cent of the claimants were entitled only to medical benefits primarily annual medical surveilance. Most of these workers had physical changes consistent with asbestos exposure e.g., pleural thickening, pleural plaques, etc., but there was no impairment or disability related to asbestos esposure.

Of the remaining 13 per cent actually entitled to compensation benefits:

- 2.6 per cent were entitled to total temporary disability payments.
- 9 per cent were entitled to "scheduled" awards, more than half of which rated 20 per cent or less disability.
- Only 1.3 per cent of all cases were disabled enough to qualify for loss of earning capacity benefits. Yet two-thirds of these determinations rated 0, i.e., no loss of earning capacity dueto the illness.

How does one interpret the results of two serious efforts to provide a prompt and effective workers' compensation remedy to workers exposed to asbestos? The state program has been able to provide workers' compensation benefits to an average of only 12 applicants annually, while the federal program denied compensation benefits to 7 of every 8 claimants. Given the progressiveness of these programs, I am unable to accept the indictment that workers' compensation has "failed". The answer lies elsewhere.

An examination of the experience in asbestos tort litigation may may provide some insight. According to Rand Corporation, the average plantiff's award in asbestos liability litigation is $35,000. Additionally, only 18 per cent of the claims are dismissed or withdrawn, while the vast majority -- more than 3 out of 4 -- are settled. The probability of recovery seems substantially greater under the tort liability system than under even "purposely liberalized" workers' compensation programs.

Almost all claimants under both the state and federal workers' compensation programs also were involved in third-party litigation. In fact, a third of the Long Beach Naval Shipyard workers with X-ray abnormalalities discovered during the screening program never filed for FECA benefits but chose to pursue a tort remedy exclusively. Of those who did file for FECA benefits, most developed their third-party action prior to filing for workers' compensation benefits --to prevent an FECA decision from negatively impacting the third-party action. The identical rationale for not pursuing benefits under the California Asbestos Workers' Account was admitted by attorneys at the legislative oversight hearings.

The reason workers exposed to asbestos can recover under tort liability while not entitled to benefits under workers' compensation programs is not because workers' compensation programs have "failed" or that the tort system is more generous. Rather, the two systems utilize two different standards for compensating victims of asbestos exposure.

While I'll leave the substantiation to those more exper in the tort system -- it seems to provide recovery for potential disability, while workers' compensation requires actual disability. The question becomes one of public policy. To compensate for exposure or disability.

As the experience under FECA demonstrates, the majority of workers exposed to asbestos rarely demonstrate impairment or disability subjected to professional medical standards and objective measures of disability. But many do show evidence of exposure.

From the Wall Street Journal, Mar. 5, 1985

Bad Riddance

Ripping Out Asbestos Endangers More Lives As Laws Are Ignored

The Insulating Material Killed Thousands of Installers; Poor Removal Is as Risky

Of Space Suits and Bandannas

By JONATHAN DAHL
Staff Reporter of THE WALL STREET JOURNAL

The Environmental Protection Agency doesn't have to look far to find people getting exposed to cancer-causing asbestos. Right across the street from its Philadelphia office, the agency caught construction workers ripping out asbestos insulation and heaving it into outdoor dumpsters.

"We could see all this asbestos dust blow by us," says an EPA spokesman. "It made us wonder how the stuff was being removed elsewhere."

The EPA isn't wondering anymore. Since that incident in 1984, shoddy asbestos removals have been alarmingly common in buildings across the country. As a result, one of the nation's greatest occupational tragedies is being repeated. More than 100,000 workers have died because they inhaled asbestos particles while installing insulation years ago. Now, despite publicity about those deaths, the deadly cycle is starting over again. This time, the eventual victims are the workers ripping out asbestos.

"It was bad enough when this happened and we didn't know the risks," says Dr. Irving Selikoff, an occupational-health expert at the Mount Sinai Medical Center in New York. "But now that we know, my God, we shouldn't let this be happening again."

'A National Problem'

Federal and state agencies cited more than 1,300 asbestos violations last year, and a government survey shows that at least 25% of removals are fouled up. Violations have occurred in schools, in apartments and even on Ellis Island in New York and on the grounds of the vice president's residence in Washington. They happen when asbestos cleanup is the main job and when it isn't. Most buildings constructed before 1970 have asbestos, and a health threat exists—even to passers-by—every time one is renovated or demolished. "It is a national problem," says Terrell Hunt, the EPA's highest ranking criminal lawyer.

Some contractors don't know that they are tearing out asbestos. Others intentionally skip precautions or use slipshod methods. One contractor was sued for hiring dozens of homeless people off the street to remove asbestos from a San Antonio, Texas, hotel. And while the EPA recently beefed up its efforts to deter hazardous removals, experts say the laws pertaining to asbestos still are weak and poorly enforced. Because of the laws' inadequacies, even workers who follow guidelines might still die from asbestos poisoning.

"There are just no standards in the business. Some people do it right, but I've seen some abuses that would make your hair stand on end," says David Kimbrell, a former president of the National Association of Asbestos Abatement Contractors, a trade group based in Washington.

Asbestos Everywhere

Ironically, some of the removal jobs aren't even necessary. Asbestos is lethal; it ranks only behind cigarettes as the leading cause of cancer. And while most of its uses are banned today, it is everywhere. Some 30 million tons of the fibrous mineral was mixed into plaster to insulate walls, pipes and ceilings during the past hundred years. But asbestos needs to come out only when it is old and crumbling. That is when the mineral's tiny particles, which cause lung cancer and other respiratory diseases, are released into the air.

Removing insulation without disturbing particles is tricky. The federal government doesn't require that asbestos come out, but it has issued reams of complicated cleanup rules. Insulation is supposed to be sprayed with water and stashed in airtight containers. Special air-circulating machines are recommended. And workers must don face masks and gear that looks like space suits. "There's almost a science to doing it correctly," says Edward Swoszowski, an indoor-air-quality consultant in Norwalk, Conn.

But many removals have been less than scientific. In the building across from the EPA's Philadelphia office, workers were gathering up asbestos debris with brooms and doing the job "the way you'd clean up your garage," says Ben Mykijewycz, an agency inspector. Eventually, the Justice Department sued the building's owner, Liberty Square Associates Ltd., for allegedly violating air-pollution laws. The owner paid a $50,000 fine last March to settle the suit, but made no admission of wrongdoing. A Justice Department suit is pending against the contractor.

Covered With Dust

In another case, the EPA says it found eight teen-agers early last year yanking out asbestos with their bare hands in an abandoned school that was being converted into a condominium in Salem, Mass. The Justice Department has filed a suit against the developer, Granite Development Co. Company officials say they didn't realize that asbestos was in the school. Neither did the youths employed to remove it. "They were covered with white dust," recalls EPA inspector Bridget McGuiness. "They started asking me, 'Is this bad?' "

Nobody knows how many bad jobs are occurring, but the Occupational Safety and

Health Administration found violations in 219 of 806 removal jobs that it inspected last year. The EPA estimates that it learns of only half of the asbestos removals; the agency is supposed to be notified of every instance. "If they're not notifying the EPA, they're probably not doing" the job right, says Patrick R. Tyson, the acting assistant secretary of OSHA. "I'm afraid a lot of people aren't handling it properly."

Most of those people won't feel any ill effects from asbestos exposure for a long time. As deadly as they are, asbestos diseases take five to 40 years to develop. And it isn't known how much exposure is harmful. OSHA estimates that 1.4 million construction workers risk becoming asbestos victims of the future, as do thousands of carpenters, electricians and others who work with insulation. Even passers-by may face a health threat. "Try to walk by [a construction site] without breathing the dust," says Charles Elkins, an acting assistant administrator of the EPA. "If it's asbestos, you're in trouble."

Some victims of asbestos removals are already getting sick. For 15 years, Dennis Burke wondered whether the insulation he was ripping out at construction jobs contained asbestos. "But if you complained, you'd get fired," he says. Now, Mr. Burke, 38 years old, has asbestosis, an incurable lung disease that causes shortness of breath. And he is still a construction worker; he can't find any other job.

Other victims could well be members of families already stricken by asbestos disease. Daniel O'Toole thought it was bad enough to have asbestosis; the 63-year-old former iron worker from Fort Howard, Md., was forced to retire early, and he can't take long walks. But last April, his son Patrick discovered he had swept up asbestos at a steel mill—the same mill in which Daniel O'Toole worked 18 years ago. "It's incredible, but my son was probably exposed to the same pipes I put in," Mr. O'Toole says.

Contractors complain that unless a building's owner hires them specifically to remove asbestos, they often don't realize that they are working with it. Asbestos insulation, which sometimes looks like plaster of Paris, isn't always recognizable.

But some people have a hard time claiming ignorance. In late 1984, the EPA says, inspectors went out three times to warn Maurice Fabiani, a developer, about shoddy asbestos removals at a powerhouse in Oakville, Conn. All they got was a lecture: "He told us we were being nitpicky," says Andrew Lauterback, a special assistant U.S. attorney. Mr. Fabiani, for his part, apparently wasn't too picky about where he left his asbestos. The EPA says it found a pile of it in an open dump behind some houses. Inspectors had to shoo away children playing in it.

The matter was serious enough to draw the first prison sentence ever in an asbestos case. Through his attorney, Mr. Fabiani contends he shouldn't be blamed for a contractor's work. But he nevertheless pleaded guilty to violating air-pollution laws, paid a $25,000 fine and, in January, served 30 days in prison. The contractor, Peter J. Vileisis, pleaded guilty, was fined $25,000 and received a one-year suspended sentence.

Some contractors ignore precautions because they don't think asbestos is harmful, particularly since inhaling the fibers doesn't cause immediate injury. Other contractors cut corners to increase profits. Certainly, the work is lucrative: Three contractors may get more than $1 million to take out asbestos from a three-story school building in Atlanta. "There's a whole bunch of hustlers out there trying to make a quick buck who will end up killing themselves and others," says U.S. Rep. James Florio, a New Jersey Democrat interested in the safe handling of asbestos.

A fast buck is what 166 workers allege motivated the contractor that renovated the St. Anthony Hotel in San Antonio in 1983. In a lawsuit, the workers assert that the contractor hired them off the street without telling them that asbestos was being removed. Most say they wore bandannas over their mouths, or nothing at all, to protect themselves from the dust. "Now, every time I get a cold in my chest, I think uh-oh, this is it," says Daniel Cady, 29, who was one of the workers. He had been recruited for the job while hitchhiking through Texas.

The contractor, Planned Management International Inc., denies exposing the workers to asbestos. But OSHA fined the company $1,500 for not posting warnings or giving workers respirators. And this month the company, the construction manager and the hotel's owner settled the lawsuit. They won't discuss the terms, but the workers' attorney says his clients are receiving a total of $1.66 million.

EPA officials say that bad practices persist because neither the federal government nor 39 states require asbestos removers to be trained or licensed. New York, one of the few states with training provisions, requires contractors only to watch a 40-minute filmstrip that regulators concede is inadequate. "A barber has to go to school, but someone can remove a hazardous substance and have no experience and no training," says Wolfgang Brandner, the EPA's regional asbestos coordinator in Kansas City, Kan.

What's more, asbestos regulations are flawed. OSHA figures that even if its standards were followed to the letter, 64 of every 1,000 workers who remove asbestos would still eventually die from overexposure. That is because the current exposure standard is two asbestos fibers per cubic centimeter of air—about four times the exposure the agency currently thinks is safe. OSHA is trying to change the standard, but "people think they're protected by these laws when they're not," says James Fite, the president of the White Lung Association, a nonprofit group in Baltimore that represents asbestos victims.

But the most frequently cited problem with asbestos laws is the way they are enforced. The EPA and OSHA inspect just a fraction of asbestos-removal jobs; many contractors have never had a job inspected. And both federal agencies routinely let violators off with small fines or none at all. OSHA's Dallas-area office, for example, hasn't levied a fine in any of its 12 asbestos cases in the past three years.

But officials in the Dallas office say they are shorthanded—the office doesn't have anyone assigned just to asbestos cases. They also say some contractors conceal violations by working at night or on weekends. But the result is that repeat violators are common. And legitimate contractors say unscrupulous competitors have a free rein. "It's basically a voluntary-compliance system," concludes Neil Wilson, the president of National Environmental Engineering Inc., an asbestos-removal company in Michigan City, Ind.

In response to such criticism, the EPA recently vowed to vigorously enforce asbestos laws. The Justice Department, as part of that effort, last month filed 11 publicized lawsuits alleging serious asbestos violations against the state of Florida, Conrail and the school system of Ankeny, Iowa, among others. And at least 10 states are considering bills that would regulate asbestos removers.

But such steps come far too late for thousands of workers who recently may have been exposed to asbestos—a known carcinogen for at least a decade. As Patrick O'Toole, the construction worker in Maryland, puts it, "My father was done wrong, and now I'm done wrong. When will it stop?"

STATEMENT OF
HAROLD SEIDMAN
PROFESSOR EMERITUS OF POLITICAL SCIENCE
UNIVERSITY OF CONNECTICUT

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before your subcommittee to discuss the Office of Management and Budget's role in reviewing and controlling executive agency rulemaking. The current preoccupation of the President, the Congress, and the courts with review and control of regulations is an inevitable response to the quiet revolution in the federal government's role and the way it conducts its business which has stimulated the proliferation of regulations. If Executive Orders No. 12291 and 12498 are to be properly evaluated, it is necessary to understand why regulations are increasingly relied upon as the principal means of influencing federal policies and achieving federal objectives. We are concerned here with something more than finding the most effective means for reducing the regulatory burden on the private sector. Control of regulations raises fundamental questions concerning the distribution of power within our constitutional system.

With the exception of programs such as Social Security, there has been a shift from direct to what has been called "indirect or 'third party' government" with responsibility for service delivery delegated to quasi government or non-federal entities, such as government-sponsored enterprises, non-profit corporations, states, cities, counties, special districts, and a wide variety of private businesses. The preferred means for carrying out federal programs are grants-in-aid to state and local governments, contracts, and loan guarantees.

The change in the way the federal government conducts its business is clearly evident from the statistics of federal civilian employment:

- The federal civilian workforce has decreased at a time when federal expenditures increased about 195 percent.

- From 1954 to 1984, federal employment per thousand population has decreased from 14.6 to 12.0.

- The Congressional Research Service estimates that the budgets of Defense, Health and Human Services, and Education support four indirect workers for every person on the federal payroll.

Professor Frederick C. Mosher was one of the first to recognize that the fundamental change in the role and responsibilities of the federal government and in the way it conducts its business called for rethinking of orthodox theories and the development of new strategies and approaches to public administration. Today, management tends to be identified with control of the third parties who provide the goods and services rather than with accountability and responsibility for service delivery. Classical organization theories which call for establishment of clear lines of authority and accountability from the President down through department heads to program administrators are inapplicable when you are dealing with non-federal entities. If the federal government wishes to influence or control the non-federal agencies which administer federal programs, it must do so either by grant and contract provisions or by regulations. Interpretation and application of rules and regulations are also the only available means for controlling entitlement programs which permit minimal administrative discretion. Governmental regulation is the inevitable concomitant of government by proxy. If one cannot control the players, then the next best thing is to dictate the rules of the game.

In the past, the contest between the President and the Congress for power to influence executive policies and actions focused mainly on issues related to executive branch structure. The contest has shifted to a new arena with jurisdiction over review and control of regulations providing the major source of conflict. The Congress suffered a temporary setback when the Supreme Court held the legislative veto to be unconstitutional, but it is currently exploring alternative methods of reasserting its control over regulations.

In whatever form imposed, however, the legislative veto cannot and was not designed to coordinate and assure consistency in executive rulemaking. As the Congress found with respect to the budget process, information gathering requests by agencies, and legislative clearance, this function can be performed only by the President or his designees. The duty to secure unitary and uniform execution of the laws is vested by the Constitution in the President. In a system which now relies so heavily on third parties to administer the laws enacted by the Congress, it is doubtful that the President can any longer effectively perform his constituional duties without exercising some control over regulations and the regulatory process. It may be argued that review of regulations must now take its place with budgetary review and legislative clearance among the essential management tools which must be available to a President.

Some contend that rulemaking remains lawmaking even when performed by an administrative agency, and that any executive intervention is inappropriate because legislative power is vested exclusively in the Congress. In fact, legislative power is shared by the President and the Congress, and enactments by the Congress must be submitted to the President for his review and approval. It would appear to be illogical to argue that administrative lawmaking should be accorded a privileged status not given to congressional lawmaking.

In Sierra Club v. Costle (687 F2d. 298, D.C. Cir. 1981) Judge Wald of the D.C. Circuit provided the most compelling argument for Presidential review of rulemaking. She emphasized that our form of government simply cannot function effectively or rationally if key executive policy makers are isolated from each other and from the Chief Executive. In her words: "Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policy makers in other agencies as well as in the White House." Given the number and complexity of regulations, the vagueness of statutory authorities and directions, and the potential conflict among program objectives, there is an obvious need for an effective central coordinating system.

The Administrative Procedure Act is silent on the issue of presidential intervention in informal rulemaking. To the extent that the OMB review process makes available to the rulemakers the comments of the affected agencies and the White House, the OMB review process is consistent with and supports the letter and spirit of the Administrative Procedure Act. The availability of such information does not in and of itself limit the discretion of responsible decision makers in reaching informed judgments.

Executive Orders 12291 and 12498 are a culmination of the efforts by the past five presidents to influence and coordinate executive agency rulemaking. Budget Bureau Circular No. A-85 (June 28, 1967) established a system under the Advisory Commission on Intergovernmental Relations for obtaining and coordinating the comments of state and local executives on rules applicable to federal assistance programs. The circular set forth certain policies which were to guide the federal rule makers. Circular A-85 was rescinded in 1978 by President Carter.

In 1971, the Office of Management and Budget initiated the so-called "Quality of Life Reviews." These reviews, which were concerned almost exclusively with Environmental Protection Agency regulations, were conducted in the same way as legislative clearance. OMB routed the proposed rules to affected agencies for comment and attempted to resolve any disagreements.

Under President Ford, the Council on Wage and Price Stability was given responsibility to intervene in rulemaking and other proceedings to assess the inflationary impact of proposed regulations. President Carter endeavored to strengthen central regulatory clearance by requiring each agency to establish a semiannual agenda of significant regulations under development and to review existing regulations for the purpose determining which regulations should be changed or eliminated. A Regulatory Council was established to oversee the regulatory calendar. Responsibility for monitoring and evaluating agency actions was assigend to a Regulatory Analysis Review Group in the Executive Office of the President.

The objections to OMB review of agency rulemaking appear to run more to the potential for abuse and conflicts with existing laws rather than to the need for central clearance and coordination of agency rulemaking. Clearly, the process should not be allowed to become the equivalent of impoundment -- a means by which OMB negates the expressed mandates of the Congress and the courts. Safeguards are necessary to maintain accountability to the Congress and to assure that OMB participation in the process is on the record and subject to scrutiny by the public and the courts.

No one disputes that the Congress has the power to define presidential authority over regulations and to prescribe the extent and limits of OMB review of regulations. If the Congress fails to act, determination of OMB's role in the review process will go by default to the President and the judiciary. The time has come for the Congress to consider again the enactment of legislation providing a statutory base for executive review of regulations, establishing policies and procedures applicable to such reviews, and defining the powers of the Office of Management and Budget.

Questions for Harold Seidman
(from Senator Durenberger)

1. Dr. Seidman, Jim Miller mentioned the "Sierra Club" Case as justification for the OMB review process, and so did you. The argument is this: OMB should have access to agency rulemaking otherwise rulemakers are too isolated from feedback on how what they do fits into the overall regulatory picture. Is that right?

2. Isn't it also true that the review process as it currently operates isolates those same rulemakers from other important feedback because it insulates the decision process from Congress anu the public, who also have a legitimate stake in the outcome?

1. Given the number and complexity of regulations, the vagueness of statutory authorities and directions, and the potential conflict among program objectives, there would appear to be an obvious need for an effective central coordinating system. Agriculture regulations to promote cleanliness in slaughterhouses may conflict with OSHA regulations to promote worker safety; FDA regulations requiring the seafood industry to wash shellfish may conflict with EPA regulations prohibiting such discharges in tidal waters. These types of conflicts need to be identified and resolved in the central review process. Also rulemakers should not be put in the position of learning after the fact that their actions are inconsistent with administration policies. As correctly noted by Judge Wald: "Single mission agencies do not always have the answers to complex regulatory problems".

2. The review process does not insulate the Congress or the public from the decision process if it is limited to review of proposed regulations. The executive orders do not and cannot alter the procedures established by the Administrative Procedures Act providing an opportunity for comment by interested parties. If the review process is utilized to prevent the promulgation of a proposed rule, then the Cpngress and interested parties are denied an opportunity to participate.

The regulatory review process has much in common with the legislative clearance process and preferably should operate much the same way. Agencies should be advised in writing of conflicts with administration policies and this "advice" should be part of the public record. While agencies may be persuaded by such advice, as they are by directives in appropriation committee reports, they are in no sense legally bound by it.

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TESTIMONY BEFORE THE SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS ON OMB'S REGULATORY POWERS

BY
GARY D. BASS, PH.D.
EXECUTIVE DIRECTOR, OMB WATCH

January 28, 1986

Mr. Chairman and Members of the Subcommittee:

My name is Gary D. Bass and I am the executive director of OMB Watch, the only organization whose sole function is to monitor the White House Office of Management and Budget. With me is our staff attorney, David Plocher.

Thank you for giving me the opportunity to testify before your committee on the issue of OMB's regulatory powers. We applaud your efforts, Mr. Chairman, to get a better understanding of the extent of OMB's regulatory powers and to search for ways to ensure that the public and Congress have greater accountability over OMB's actions. OMB Watch stands ready to assist in the process of developing constructive alternatives to improve the rulemaking process.

We believe that OMB is secretly controlling public policy in this country -- bypassing Congress and the regulatory agencies -- by using an unprecedented and dangerous array of executive powers.

These executive powers exist because of a combination of unchecked assertions of authority by the White House and unwise delegations of authority by Congress. This centralization of power threatens our democratic principles of public participation in government decision-making and the separation of powers among the three branches of government.

We believe Congress should act quickly (but carefully) to clearly define the role of the White House in supervising the work Congress has delegated to the federal administrative agencies.

Regulation is the engine of government, driving programs and policies according to Congressional design. However, through Executive Orders 12291 and 12498, the White House Office of Management and Budget has now moved into the driver's seat. OMB effectively sets policy by controlling agency regulatory decisions in virtually every area of government action: civil rights protections, regulation of health hazards in the workplace, purchase preferences for small businesses, agricultural directives, and much more.

At a minimum, Congress should require greater accountability by lifting the cloak of secrecy veiling OMB's review of agency actions. We believe the public has a right to get involved in the OMB decision-making process, since it ultimately affects the public.

More specifically, and as a stopgap measure only, we recommend that draft materials submitted to OMB under E.O. 12498 be made publicly reviewable, and that OMB personnel document their actions as part of the public record (as other agency personnel do) when involved in any aspect of agency activity that may lead to rulemaking.

My testimony today will examine several problems with the current regulatory oversight process including the fact that:

(1) The transfer of complete regulatory control to OMB has taken place without any authorizing legislation, relying solely on presidential executive orders, and goes far beyond any of OMB's mandated management functions;

(2) OMB is using its executive powers to make and direct federal policy in a way that displaces agency powers and render useless the Administrative Procedure Act;

(3) The public and Congress have no access to the OMB decision-making process;

(4) E.O. 12498 raises the possibility that activities covered by the Paperwork Reduction Act may now be captured by the Regulatory Planning Process and be subject to even more secrecy;

(5) OMB has tremendous "informal" power over agencies, making it not only extremely difficult to limit OMB clout, but also to document the degree to which it controls the substance of what agencies do; and

(6) OMB personnel are not required to keep publically accessible records of their involvement in agency rulemaking.

At your request, we have also made some preliminary suggestions for improving the regulatory process. We emphasize that they are preliminary in nature and will require further thought. We look forward to working with you in fleshing out these and other ideas.

1. OMB'S UNAUTHORIZED TOTAL REGULATORY CONTROL

Ostensibly E.O. 12291 and E.O. 12498 were created to help get the government off the backs of the people. In principle, we support this effort -- no one appreciates burdensome government red tape.

In February 1981, not a month after his inauguration, President Reagan issued Executive Order No. 12291, which gave OMB authority to subject all "major" proposed rules to cost/benefit analysis. Within OMB, the regulatory review powers were placed in the Office of Information and Regulatory Affairs [hereafter OIRA], then under the leadership of James Miller. Miller had been arguing the importance of cost/benefit analysis for some time, most notably in his years at the American Enterprise Institute.

It was at AEI that Miller championed the idea of applying the cost/benefit economic tool to the social regulation explosion. The implementation of E.O. 12291 could be seen as an attempt to control this explosion in social regulations. This Administration's bias is that government intervention is usually not necessary; market forces can and will regulate effectively if left unrestrained, in social as well as economic areas.

However, things did not work out as expected. The simplistic model of cost/benefit analysis did not provide any sort of acceptable method for valuing social costs and benefits (e.g., How much is a life worth today? How much will be worth in twenty years?). This meant that OMB personnel were left to second guess agency professionals and to subordinate legislative policies to the ideological predilections and personal experiences of White House officials.

The record is clear that on the basis of E.O. 12291 OMB forced agencies to miss statutory and judicial deadlines for administration action, overruled agency technical judgments without justification, and often served as a conduit to impose private industry views on agencies that were trying to regulate the private industry.

While Congress and the public have been very slow to recognize OMB's abuse of power under E.O. 12291, OMB quickly learned that the Order was not enough for its purposes. As former OIRA Administrator Douglas Ginsburg said in December 1984 at a luncheon before the, Chamber of Commerce, the E.O. 12291 review "often comes too late. Agencies have been working on proposed regulations long before they come to notice and comment [when they are published in the Federal Register pursuant to the APA and OIRA can review them under E.O. 12291]. Then we get ourselves in a confrontation with the agency over the end product."

The solution was another Executive Order without any legislative basis, and without any of E.O. 12291's administrative limitations. The new Order, No. 12498, created the "Regulatory Planning Process." It is integrated with E.O. 12291, but goes well beyond it to give OMB explicit veto power over virtually all agency activities. Other key differences include:

(1) E.O. 12498 allows OMB to review not only proposed rules, as did E.O. 12291, but "pre-rulemaking" activities as well. OMB can scrutinize any agency action it deems significant that may lead to the development of rulemaking any time in the future;

(2) Unlike E.O. 12291 which only halts rulemaking until OMB finishes its review, E.O. 12498 prohibits an agency from doing any work on a subject until OMB gives the go ahead;

(3) Under E.O. 12498, OMB approvals are based on whether the activity is consistent with the President's policies and priorities, not simply cost/benefit analysis as required by E.O. 12291; and

(4) While there is almost no public involvement in the E.O. 12291 process, there is absolutely none under E.O. 12498. It is shrouded in complete secrecy, even the Freedom on Information Act provides no access. Moreover, it irreparably alters agency decision-making long before public protections, such as the Administrative Procedure Act, can be applied.

E.O. 12498 allows OMB to control the substance of what agencies do. Agencies are required to submit "significant regulatory actions" for OMB review before they begin any work on the activity. OMB defines the actions that are considered "significant." And if agencies have any doubt about whether an action is significant OMB advises them to "consult with their OIRA Desk Officers...[in] cases of doubt," a de facto review.

The outcome of OMB's E.O. 12498 review is published as The Regulatory Program of the U.S. Government. The publication is important not only for what is in it, but also for what is not. There is no indication of what has been disapproved, only what has been approved. Thus, there is no way to find out what agencies wanted to do but were not allowed or whether OMB is imposing a political litmus test on agencies.

For further information about E.O. 12498 and the rulemaking process, we refer you to our report, "OMB's Control of Rulemaking: The End of Public Access," which we released last August. The report provides a comprehensive description of the control OMB has obtained over government decision-making.

Executive Orders 12291 and 12498 permit OMB to run the government in secret. Whether it be intentional or unintentional the Orders allow OMB to set public policy without public input and often despite Congressional and judicial imperatives.

Two things about these Orders cannot be denied:

- They go well beyond "management tools" for improving regulatory decision-making. OMB can only mask so much behind the rhetoric of improved efficiency when it is clearly directing the substantive work of federal agencies.
- They help implement the President's own domestic social policy agenda, which includes reducing federal responsibility for important social, health and safety, and civil rights protections.

Because of OMB's secrecy it is very difficult to appreciate the full scope of OMB's actions this year under E.O. 12498. However, we do know that nearly one-fourth of all proposals from the Department of Agriculture and 44% of those of the Department of Health and Human Services did not survive the OMB review process.

Exhibit A provides more information about the proposals that were killed by OMB review. One caution: The numbers alone do not reflect why a proposal may have been disapproved or why a proposal for a "final" rule may have been cut back to a "proposed" rule or a "proposed" rule to a "prerulemaking activity." In fact, that is part of the problem. We cannot find out this information. And given OMB's record, its assurances that the system is working well is not satisfactory.

It is especially shocking that OMB can exercise such powers when Congress has never granted OMB any regulatory oversight powers, let alone authority to control the substance of agency activites. The closest Congress has come was in the Paperwork Reduction Act, which created OIRA and gave it various information management powers. However, it was never intended to give OMB substantive control over agencies. In any event, no funds have been authorized for that Act in the last two years.

2. OMB'S CIRCUMVENTION OF THE ADMINISTRATIVE PROCEDURE ACT

Congress passed the Administrative Procedure Act to insure that the public has the opportunity to be involved in the creation and revision of government regulations, and that there will be standards for agency decision-making to facilitate judicial review. Time and time again the APA has proved its value. Federal Register notices of proposed rules have elicited public comment, and the compilation of rulemaking records have provided a basis for review of agency decision-making by the public, Congress, and the courts.

While E.O. 12291 generally is set forth in the context of APA rulemaking, the fact that final OMB review occurs after the public comment period, and that OMB decisions are exempted from judicial review, definitely undercuts APA protections. E.O. 12498 goes much farther than its predecessor. It simply ignores the APA.

OMB's protestations that E.O. 12498 does not violate the APA is ludicrous because E.O. 12498 reaches agency activities before the APA rulemaking process even begins. This simply makes the APA public protections irrelevent, and completely separates the basic agency decisions from the record which would be reviewed by any court.

It is bad enough that under E.O. 12291, OMB can politically screen or manipulate a proposed rule despite public comment. But it is absolutely incredible that under E.O. 12498 OMB can kill any proposed agency activity and then make it impossible for anyone (i.e., the public, Congress, the courts) to know anything about it.

There is admittedly too much litigation in this country, but OMB's on-going effort to avoid scrutiny must be ended. Its decisions must be made publically and judicially reviewable.

3. LACK OF PUBLIC AND CONGRESSIONAL ACCESS TO OMB DECISION-MAKING

On April 19, 1985, former OMB Director David A. Stockman instructed agencies to comply with congressional requests to review draft materials agencies submitted to OMB E.O. 12498. However, Stockman added:

> "[The material] we have received does not reflect the more considered and deliberative regulatory process that the Order called for and that we anticipate will be developed in future years of the program. Furthermore, it appears that some of

> the draft plans have already been made available to Congress, resulting in some Members of the Congress and Committees having access to some of the plans and others not.
>
> Therefore, although the draft regulatory plans are clearly within the deliberative process, disclosure of them this year, given the unique circumstances, is not likely further to impair that process within the executive branch or other aspects of the executive branch's constitutional duties."

Stockman's message was clear -- Congress can review the materials, but only this year. OMB allowed congressional access because the process is new and did not yield information which, according to OMB, Congress did not already know.

It is not clear what the policy will be under James Miller; that is, whether congressional oversight committees can find out what their agencies are proposing to do and how OMB is disposing of them. It is shocking, though, that we must wait and see what the OMB Director's position is. This is a Congressional right that should not be held to the whimsy of a political appointee.

Not only is the Congress locked out of the process, but so is the public. As described above, APA protections do not apply in the new rulemaking system. But OMB has even gone further in cutting out public involvement. It has instructed agencies to treat material submitted under E.O. 12498 in the same manner as fiscal budget material. Thus, communication between agency and OMB is held in secret. Yet, unlike the fiscal budget there is no final product on which Congress debates and gives approval; OMB does it all.

We are very concerned about this process and under the Freedom of Information Act requested copies of the materials submitted to OMB for review. These are the same materials which former Director Stockman finally released to Congress. We sent FOIA requests to seven agencies: the Departments of Agriculture, Education, Health and Human Services, Labor and Transportation, the Environmental Protection Agency and the Equal Employment Opportunity Commission. All but the Department of Agriculture claimed a pre-decisional exemption, making access, even through FOIA, apparently impossible.

We strongly recommend that Congress require all drafts submitted to OMB be made publicly reviewable at the time of submission. OMB officials have suggested that access to draft submissions might be permitted at the end of the rulemaking process or at the end of the fiscal year. Neither of these options is acceptable.

If OMB is permitted to have such an integral role in the substance of agency decision-making, then the public, Congress, and the courts must be given access to the process, as well. It is meaningless to review and comment on agency matters when the decisions have long since been made; and not even by the agency, but by OMB.

4. PAPERWORK vs. REGULATORY TRACK

Under E.O. 12498, OMB requires agencies to submit all significant pre-rulemaking actions for review. The definition of "pre-rulemaking" is left entirely open. It includes any action that may "influence, anticipate, or could lead to the commencement of rulemaking proceedings at a later date." (E.O. 12498 sec. 2(a)).

This broad definition allows OMB to reach deep into agency activities. For example, last spring we described OMB's disapproval of a Public Health Service proposal to study the impact of federal budget cuts on infant mortality rates. OMB claimed that the results of such a study might lead to some future rulemaking, and required PHS to submit the proposed study for OMB review under the pre-rulemaking clause of E.O. 12498.

Normally, the proposed PHS study would have been submitted to OMB under the Paperwork Reduction Act for clearance as an information collection request. As the submission went to OMB a notice of the paperwork review would have appeared in the Federal Register. However, because the PHS proposal was captured by the E.O. 12498 process, PHS did not give any public notice. And but for a leak, OMB killed it behind closed doors as a significant pre-rulemaking activity that is inconsistent with the President's policies and priorities. Remember also that the E.O. 12498 standard of review differs from that of the Paperwork Reduction Act, namely, not duplicative, unduly burdensome, or of no practical utility.

It is hard to tell how often agency information collection proposals are caught in the regulatory track. But the stakes are not insignificant. The Administration's Regulatory Program contains 125 pre-rulemaking activities, nearly one-fourth of all the proposals approved by OMB.

We can not say with any certainty how many "pre-rulemaking" proposals agencies actually submitted and how many OMB killed. Still, as our Exhibit A details, it appears the Public Health Service proposed 18 pre-rulemaking activities. Its final program contains 7. The Social Security Administration proposed 19 pre-rulemaking activities, but only one appears in the final program.

One wonders what happened in the case of the Health Care Financing Administration. At the beginning of February 1985 HCFA proposed to include twelve "research activities" as pre-rulemaking activities. When a second draft was circulated the twelve had shrunk to only four. And by the time the final program was put together, they were all gone. What happened to them is anyone's guess.

The problem is highlighted by a March 21, 1985 memorandum from Carl Slutter, Director, Division of Provider Payment Policy in the Health Care Financing Administration (see Exhibit B). Mr. Slutter states very firmly that a proposed Ambulatory Surgical Center survey should not be included in the new regulatory process. He says: "This is NOT a significant regulatory action...It is accounted for under the normal information collection rules" (his emphasis).

Despite Slutter's insistence that the submission should be sent as a paperwork clearance request and announced in the Federal Register, it was not. The survey does, however, appear in the Administration's FY 1985 Regulatory Program, indicating OMB reviewed and approved it as a pre-rulemaking activity.

While OMB approved the survey, the striking fact is OMB's ability to capture agency activities in either the regulatory or paperwork tracks. And apparently the agencies do not have much to say about the matter.

OIRA, when created by the Paperwork Reduction Act of 1980, was cautioned by the Senate Committee on Governmental Affairs that it did "not intend that 'regulatory reform' issues which go beyond the scope of information management and burden be assigned to the Office..." (Sen. Rpt. 96-930, 9/8/80, p. 9). OIRA did not listen. In 1981, James Miller, as the first Administrator of OIRA, told a subcommittee of the Committee on Governmental Affairs, "Regulations and paperwork are identified together in the public mind, and realistically we cannot expect to reduce paperwork without also addressing regulatory excess" (Testimony before the Subcommittee on Federal Expenditures, Research, and Rules, March 8, 1981, p. 22).

Accordingly, OIRA has relied on the paperwork clearance process as a way to monitor and shape agency regulatory activities. Although Congress has authorized no money for the Act during the last two years, OMB has been busy clearing agency forms which implement agency rules. When OMB disagrees with an agency activity it can disapprove the forms related to it as having, for example, "no practical utility" or for being "unduly burdensome." Alternatively, it can demand that an agency provide additional justification for the proposals, or require revisions, or even force an agency to begin rulemaking proceedings and change underlying regulations.

In effect, the paperwork clearance process, coupled with E.O. 12291 and E.O. 12498, affords OMB comprehensive control over agency activities. However, unlike E.O. 12498 where OMB can directly control the substance of agency regulations, or E.O. 12291 where OMB has virtual veto power over agency regulations, the paperwork clearance process was only intended to allow OMB to reduce duplicative, burdensome, or unnecessary paperwork.

Congress should get a more accurate picture of the relationship between the E.O. regulatory review schemes and the Paperwork Reduction Act. An immediate concern should be those activities covered by the Act that are now being captured by E.O. 12498 and secretly disapproved. A more general concern should be the regulatory power OMB is claiming under the Act. Congress was very clear that it did not intend to give OMB substantive powers through the Paperwork Act. Yet OMB has repeatedly used the Act, with sledge hammer efficiency, to achieve its own policy objectives.

5. OMB'S INFORMAL AND UNLIMITED POWERS

Everyone is well aware of and strangely inured to OMB's ability to influence agency activities through its arsenal of budget, management, legislative clearance, personnel, and other powers. But even within the specific provisions of E.O. 12291 and E.O. 12498, OMB's ability to negotiate, push and prod is virtually unlimited.

First, the new E.O. 12498 process is riddled with "informal" opportunities for OMB to review and kill agency activities. OMB Bulletin 85-9, Attachment 1, pg. 2 states:

> "Agencies are encouraged to consult with their OIRA Desk Officer in developing the list of 'significant regulatory actions'....[or in] cases of doubt as to whether a planned step or action is major."

Supplement No. 1 to OMB Bulletin 85-9, April 22, 1985, Sec. 5(b) goes further:

> Agencies are also encouraged "to make partial or informal submissions of these descriptions in order to facilitate our review and preparation of the final publication."

Thus, even if OMB were to make the draft submissions publicly reviewable, which we wholeheartedly support, it would not necessarily provide the true picture.

Second, once the OIRA desk officers receive the formal submissions, be they the draft or final plans, there are no criteria that limit or define how the agency proposals will be reviewed. It's a back alley game with the bully making the rules as it goes along.

For example, in March of last year, after agencies sent OMB their draft regulatory plans required under E.O. 12498, an OIRA desk officer, Faye Iudicello, met with PHS personnel to discuss their proposals. Exhibit C is a memo from Bob Spencer, a Public Health Service Regulations Officer, which summarizes Iudicello's comments on what OMB would likely approve and disapprove in the final plan.

Ms. Iudicello identified seven proposals OMB would approve if they conformed to content she described in the meeting. She also stated that seven proposals would be disapproved unless "more convincing information" was submitted; and that "OMB would not expect to include" another six items [identified in the memo, our Exhibit C] in the Administration's Regulatory Plan.

These comments are important in light of the benign image OMB has publicly displayed. According to OMB Bulletin 85-9, Supplement No. 1, OMB instructs agencies to simply submit the final plan and it will be published, implying that OMB is merely performing a coordinating role. What the Bulletin does not say is that OMB carefully screened each plan before and after the agency's final submission.

Many questions still remain:

(1) To what extent is OMB controlling what agencies even send for review?;

(2) Is OMB review becoming a chilling form of control in the Executive branch, silencing the creative voices of agencies, even driving personnel out of government?

(3) On what specific grounds do OIRA desk officers justify disapproving proposed agency activities and is there any record, whether at the agency or at OMB, of the review contacts? and

(4) Should anything as important as rules implementing virtually all federal policies be left to an unaccountable office staffed by two and half dozen desk officers, and armed with so many formal and informal powers?

The practical impact of OMB's review might be that agencies will not even submit proposals to OMB because they believe that they will never be approved. Or if agencies know that OMB will reject a proposal, they may not even try to develop a comprehensive justification, giving OMB greater opportunity to kill it.

As long as OMB can proceed in a manner that requires no publicly reviewable documentation of its informal and formal interactions with agencies, OMB abuse of power will remain unchecked. There is no way of knowing the true impact of OMB's hidden hand on agencies. How often will agencies stop work because they receive a call from OMB?

6. THE LACK OF PUBLIC ACCESS AND RECORDS

Over the last five years there have been repeated examples of OMB officials meeting off the record with representatives of private businesses and with agency personnel. If anyone doubts that this is the case, I would refer them to a recent report from the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee, EPA's Asbestos Regulations (Committee Print 99-V, 10/85).

We simply repeat our recommendation, here, that OMB personnel should be required to keep records of all activities that may relate to agency regulatory decisions. These records should be maintained for review by Congress, the public, and the courts.

PRELIMINARY SUGGESTIONS FOR REFORM

We have three suggestions to help improve the long-term health of the regulatory process. Although preliminary in nature, taken together, we believe they will help Congress, the public, and the courts have greater accountability over the rulemaking system.

1. Congress must take legislative action.

It is constitutionally inappropriate for the Executive Branch to legislate. In essence, this is what E.O. 12291 and 12498 represent. But it is also shocking that Congress has been silent as the President and his Office of Management and Budget have usurped Congressional prerogatives.

Congress should legislatively define the relationship between agency rulemaking and Presidential oversight. In most cases Congress delegates rulemaking responsibility to specific agencies, not to the President or to his OMB. Congress has also passed the Administrative Procedure Act to insure that there is public involvement and judicial review of the rulemaking process.

However, the Executive Orders reverse these two congressional mandates. As described above, OMB has circumvented the APA, particularly under E.O. 12498, and has cut off public participation in the critical stages of the rulemaking process. My testimony has also shown that OMB displaces agency responsibility in rulemaking by involving itself in the substantive aspects of agency actions.

The needed legislation should not merely be a restrictive provision added to the APA, but rather a comprehensive bill that addresses the importance and integrity of agency decision-making outside the limited context of APA rulemaking. If agency actions can be so intrinsically affected by external review, as in the E.O. 12291 and 12498 process, they must be protected with procedural standards and provisions for public access and judicial review. While many other regulatory reform issues may warrant legislative action, the problem of regulatory oversight by the Executive Office of the President is so pressing that it must be addressed soon, and in a manner that is not diluted by other concerns.

We do not make this suggestion naively. We fully understand that many institutional forces argue against the passage of a regulatory bill. But the fact that there are such forces is not reason enough to abdicate your legislative responsibilities. The issues are too important -- the fundamental principle of separation of powers, for one.

2. Congress needs a vehicle for understanding the programmatic implications of administrative decisions made by the Executive Branch.

In the Congressional Budget and Impoundment Act of 1974 Congress created the Congressional Budget Office (CBO). Congress needed such an office to provide technical information about the budget so that it could be sufficiently well-informed to make intelligent budgetary decisions. And since its creation, CBO has faithfully served Congress in providing analyses of the President's budgetary and legislative proposals, projections of economic trends, programmatic implications of budgetary changes, and much more. Now, more than ten years later Congress would not dream of operating with a CBO.

But Congress does not have a similar vehicle for analyzing the programmatic impact of administrative changes created by the Executive Branch. Over the last 10 years, we have learned that more and more administrative decisions -- Presidential executive orders, regulatory decisions, paperwork clearance, control of collection and dissemination of information -- make and break laws.

In fact, OMB now publishes two other "budgets" besides the fiscal one, an Information Collection Budget and the Regulatory Program. Yet Congress has no way of tracking these publications or other administrative decisions affecting the laws passed by Congress. The loss of the legislative veto makes it all the more important that Congress have some ongoing method of at least monitoring the administration of its laws.

3. OMB should not be making policy decisions.

The President is elected to faithfully execute the laws. In doing so, he inevitably puts his ideological stamp on the way government operates. He is able to do this by appointing people of similar thinking to run the various agencies. And the public expects this to happen.

However, the public does not expect to have an agency like OMB, by and large, run the government, bypassing congressional and judicial review. There is mounting evidence that OMB's secret operations hide an ongoing effort to virtually remake federal policy. In essence, it is an unelected government.

We believe that OMB should not be in such a powerful position, and the lack of public accountability is an anathema to our democratic principles. The basic principle of separation of powers prescribed by the Constitution reminds us of the importance of balancing, limiting, and accounting for decisions made by our government.

We recognize that this problem will not change overnight. Along with legislative changes to more clearly delineate legislative and administrative prerogatives, particularly regarding White House and OMB regulatory review, there must be some legislative definition of the exercise of such power within the Executive Office of the President.

A first step is to move much of the decision-making power out of OMB. What review decisions there are should be limited to the policy directions provided by a body such as the President's Cabinet Council. Review and veto power over individual agency activities should not be exercised anywhere outside the agencies to whom Congress delegated substantive authority. Decisions of the President and his appointees should be made in the general administrative policy arena, certainly not by a single agency that can control agency activities without any accountability to Congress, the public, or the courts.

This concludes my remarks. Let me refer you again to our three exhibits and our report, OMB Control of Rulemaking: The End of Public Access, all of which, I believe, will add to your understanding of the affect of OMB regulatory review on federal agency decision-making.

We appreciate the opportunity to present our views. And we would be happy to answer any questions.

OMB WATCH
2001 O STREET NORTHWEST,
WASHINGTON, D.C. 20036
TELEPHONE: (202) 659-1711

APPENDIX A

12/85

A RECORD OF LOSSES:
AGENCY PROPOSALS THAT DID NOT SURVIVE
THE OMB REGULATORY PLANNING PROCESS

The Regulatory Program of the U.S. Government (issued August 8, 1985) gives a detailed picture of federal agency activities that have been approved by the Office of Management and Budget (OMB) under Executive Order No. 12498. However, it does not reveal what activities the agencies would or might do, but for disapproval by OMB.

It is almost impossible for anyone outside of the process to appreciate what factors went into decisions to propose, review, approve, or disapprove activities covered by the E.O. 12498 Regulatory Planning Process. One is limited to trying to identify those proposals which were dropped or significantly changed by comparing the final program with agency draft materials. This is not easy because OMB and most agencies have refused to release any of the draft materials for public review.

Two agencies for which there are some tentative numbers and titles to compare are the Departments of Agriculture and Health and Human Services. The titles listed below are those which were proposed at some point by the agencies but did not appear in the final regulatory program.

DEPARTMENT OF AGRICULTURE

Food & Nutrition Service
  1 Thrifty Food Plan and Deduction Rates
  2 Competitive Foods
Farmers Home Administration
  3 Special Supervision of Delinquent and Problem Case FmHA Farm Borrowers
  4 Receiving and Processing Applications [Use of Taxpayer's Identification Number]
  5 Revisions to Regulations Mandated by Recent Housing Amendments
  6 Real Property
  7 Property Management
Rural Electrification Administration
  8 Lien Accomodations
  9 Working Capital
  10 Supplemental Loan Criteria

There are thirty-four actions approved for the Department of Agriculture in the final regulatory program. In so far as ten proposed actions are not included, nearly one-quarter of USDA's proposals were apparently disapproved.

DEPARTMENT OF HEALTH AND HUMAN SERVICES*

Health Care Financing Administration

Reimbursement Initiatives

- Prerulemaking Activities
  - 1 Revise Periodic Interim Payment (PIP) Participation Criteria
- Notice of Proposed Rulemaking
  - 2 SNF Cost Limits (Effective 7/1/84) for Hospital-Based SNFs
  - 3 Clarification of Policy on Adjusting the Hospital-Specific Portion of the Prospective Payment Rate
  - 4 Payment Adjustments for Sole Community Hospitals
  - 5 Revisions to Medicaid Payment for Inpatient Hospital and Long-Term Care Facility Services
  - 6 Home and Community Based Service Waivers Expenditure Controls
  - 7 HHAs: Aide Training and Financial Security Requirements

Administration and Managment

- Prerulemaking Activities
  - 8 Commercially Prepared Enteral Food Products; Coverage Under Medicare Part B
- Final Rules
  - 9 Medicare and Medicaid: Intermediate Sanction of Long Term Care Facilities
  - 10 Income and Eligibility Verification

Standards Improvement

- Final Rules
  - 11 Medicare and Medicaid: Survey and Certification of Health Care Facilities

Research Activities

- Prerulemaking Activities
  - 12 Including Payments for Physician Services to Hospital Inpatients in Medicare DRG Payment Amounts
  - 13 Feasibility of Reimbursing for Durable Medical Equipment Under Medicare on a Competitive Bidding Basis
  - 14 Feasibility of Reimbursing for Laboratory Services Under Medicare on a Competitive Bidding Basis
  - 15 Feasibility of Reimbursing for Medicare Skilled Nursing Facility Services on a Prospective Payment Basis and of Including Payments of Hospital-Based Skilled Nursing Facilities Within the Medicare Hospital Prospective Payment System Payments
  - 16 Feasibility of Reimbursing for Home Health Services Under Medicare and Medicaid on a Prospective Payment Basis
  - 17 Extension of the Medicare Hospital Prospective Payment System to Uncovered Hospitals
  - 18 Urban/Rural Payment Differential Under the Medicare Hospital Prospective Payment System
  - 19 Redefinement of Diagnosis-Related Groups Under the Medicare Hospital Prospective Payment System to Account for Severity of Illness

20 Reimbursement of Sole Community Hospitals Under the Medicare Hospital Prospective Payment System

21 Treatment of Uncompensated Care Costs Under the Medicare Hosptial Prospective Payment System

22 Adjustments for Large Rural Teaching Hospitals Under the Medicare Hospital Prospective Payment System

23 Feasibility of Reimbursing for Medicare Services on a Geographic Capitation Basis

Office of Child Support Enforcement

1 Implementation of Child Support Enforcement Amendments of 1984

Office of Human Development Services

1 Child Abuse and Neglect Prevention and Treatment Program - Final Rule (With Respect to Baby Does)

2 Foster Care Maintenance Payments, Adoption Assistance, and Child Welfare Services - Notice of Proposed Rulemaking and Final Rule

3 Foster Care Maintenance Payments, Adoption Assistance, and Child Welfare Services - Notice of Proposed Rulemaking

Public Health Service (PHS)

PHS - Alcohol, Drug Abuse, & Mental Health Administration

1 Obligated Service for Mental Health Traineeships (proposed)

2 Confidentiality of Alcohol and Drug Abuse Patient Records (final)

PHS - Centers for Disease Control

3 Federal Policy on Prospective Payment Systems (pre-rulemaking)

PHS - Food and Drug Administration

4 Pasteurization of Milk Products Sold for Human Consumption (Raw Milk) in Interstate Commerce (Pre)

5 IND/NDA Guidelines (pre)

6 Pacemaker Registry Regulations (pre)

7 Tentative Decision on Phenylpropanolamine (PPA). Amendments to Tentative Final Monograph and Reopening of Administrative Record for OTC Nasal Decongestant and Weight Control Products for Human Use (proposed)

8 Tentative Final Monograph for Internal Analgesic, Antipyretis and Antirheumatic Drug Products for Over-the-Counter (OTC) Human Use (proposed)

9 Alertness Aid Drug Products for Over-the-Counter (OTC) Human Use; Nomenclature Change for Alertness Aid Drug Products for Over-the-Counter (OTC) Human Use (final)

PHS - Health Resources and Services Administration

Pre-rulemaking Activities

10 Organ Transplant Program

11 Reconceptualization of Shortage Area Designations

12 Health Maintenance Organizations Program Review

13 Special Project Grants to Support State and Local Health Initiatives

14 Relationship Between Federal Programs and Changes in Infant Mortality Rate/Low Birth Weight

15 Competitive Service Status for Indians

16 Review of Qualification Standards for Indians in the Excepted Service in the Indian Health Service
17 Increase in Medicaid Reimbursement for Services Delivered to Indians
18 Options for Indian Health Service (IHS) Billing for the Cost of Care Provided by IHS
19 Funding of P.L. 93-638 Contracts
Final Rulemaking Activities
20 Standards for the Accreditation of Education Programs for the Credentialing of Radiologic Personnel
21 Elimination and Phase-Out of Hansen's Disease (Leprosy) Special Pay for Civil Service Employees

PHS - National Institutes For Health
Pre-rulemaking Activities
22 Possible Regulations in Other Federal Agencies in the Area of Biotechnology
23 Model Federal Policy for the Protection of Human Subjects
24 Public Health Service Policy on Humane Care and Use of Animals

Social Security Administration
DISABILITY PROGRAM
Pre-rulemaking Activities
1 Consultative Examinations, Procedures for Claimants/Beneficiaries to Routinely Release Reports of Examinations to Their Treating Physicians
2 Weight to be Accorded Evidence, "Not Severe" Impairment Concept, Severity of Impairment Source Book
3 Other Medical Considerations
4 Uniform Standards Provision (Section 10); Social Security Rulings - Vocational Considerations
5 Title II and XVI Residual Functional Capacity Assessments of Physical and Mental Impairments
6 Mental Residual Functional Capacity (RFC) Grant
7 Uniform Standards Provision (Section 10); Vocational Considerations
8 Use of Work Evaluation Facilities in the Assessment of Claimants with Mental Impairments
9 Uniform Standards Provision (Section 10) E
10 Uniform Standards Provision (Section 10) F
11 Incorporation of Existing Rulings on Substantial Gainful Activity
12 Revision of Substantial Gainful Activity and Trial Work Period Amounts
13 Revision of Trial Work Period
14 SSR 81-6 - Evaluation Guides for Whether Disability Counts
15 Review of Permanent Impairment, Age 58, DWB and CDB Periodic Review Cases' Review of Permanent Impairment List
16 Weight to be Accorded Evidence
17 Payment for Vocational Rehabilitation Services in Certain Months When Title II and Title XVI Disability/Blindness Payments are Not Made
18 Federal Mine Safety and Health Act of 1977, Title IV Black Lung Benefits (The Act)

Proposed Rulemaking Activities
19 Compliance with Federal Law - Section 17
20 Personal Appearance Demonstration Projects

RETIREMENT AND SURVIVORS INSURANCE PROGRAM

Proposed Rulemaking Activities
21 Coverage of Employees of State and Local Governments
22 Wage Coverage under Social Security
23 Opportunity for Oral Hearing Before Benefit Recovery
24 Simplified Fee Process for Representatives of Claimants
25 Extension Agreements for Payment of State's Contributions and Refund of Overpayments
26 Overpayments; Against Equity and Good Conscience Defined
27 Finality of Administrative Law Judge Decision Following Remand by Federal District Court if Appeals Council Takes No Action within 60 Days
28 SSA Representation at ALJ Hearing; Use of Project Management Organization

SUPPLEMENTAL SECURITY INCOME PROGRAM

Final Rulemaking Activities
29 Valuation of In-Kind Support and Maintenance
30 Change in Parent-to-Child Deeming Computation
31 Couples Living in Same Room in Institution

AID TO FAMILIES WITH DEPENDENT CHILDREN

32 The Deficit Reduction Act of 1984; Individuals who must File for Assistance As a Unit

There are 87 approved activities for the Department of Health and Human Services in the final regulatory program. Review of various HHS draft material indicates that there were at least 67 other proposals which do not appear in the final program (not counting the Office of the Secretary).

	Prerule		Proposed		Final		Total	
	drft	final	drft	final	drft	final	drft	final
(OSec	?	1	?	1	?	0	?	2)
HCFA	7	4	20	10	5	7	32	21
OCSE	1	1	2	1	1	1	4	3
OHDS	2	1	3	0	1	2	6	3
PHS	18	7	29	21	16	13	63	41
SSA	19	1	25	10	3	6	47	17
HHS*.	47	14	79	42	26	29	152	85
approved*	29.8%		53.2%		111.5%		55.9%	

* These totals exclude the Office of the Secretary for which we do not have any draft regulatory program materials.

NOTE: These are tentative, unconfirmed numbers. They also do not reflect why proposals were disapproved or why they may have been changed from, e.g., a proposed rule to a pre-rulemaking activity, or simply because of the passage of time from a proposed rule to a final rule. However, the totals do show the number of proposals that were eliminated as a result of the OMB regulatory planning process.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care Financing Administration

6325 Security Boulevard
Baltimore MD 21207

APPENDIX B

MAR 21 1985

NOTE TO: Harry Hetherington

The form from EOMB Bulletin No. 85-9 is inappropriate for the Ambulatory Surgical Center survey. This is not a significant regulatory action. Therefore I do not believe this should go forward. It is accounted for under the normal information collection rules.

Carl Slutter

APPENDIX C

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Office of the Assistant Secretary
for Health
Washington DC 20201

MAR 21 [illegible]

NOTE TO DR. MASON

Through: Acting DASH-P&E /s/Friedman

Subject: OMB Informal Comments on HRSA Regulatory Plan

On March 19, Paul Schwab, Director, Office of Program Policy Coordination, HRSA; and Jack Phelan, ES/OS met with Faye Iudicello, OMB, to discuss the HRSA portion of the PHS Regulatory Plan.

Paul Schwab said that OMB intends to provide to all Departments a formal feedback to the Regulatory Plans submitted to OMB. The purpose of the meeting was for OMB staff to discuss informally with agency staff the contents of the items submitted in the Regulatory Plan.

Faye Iudicello indicated that of the items included in the HRSA Regulatory Plan, OMB would most likely approve the following items for inclusion in the Administration's Regulatory Plan to be published in May:

1. Health Education Assistance Loan Program (NPRM)
2. Health Professions Student Loan Program (Final Rule)
3. Nursing Student Loan Program (Final Rule)
4. Limitation on Federal Participation for Capital Expenditures (Section 1122) (Final Rule)
5. Grants for Hospital Construction and Modernization; Federal Right of Recovery and Waiver of Recovery (Final Rule)
6. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill-Burton -- Public Hospitals) (NPRM)
7. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill Burton -- General Program Review) (Prerulemaking Activity)

During the discussion of these seven items, Faye Iudicello stated that OMB expects that the regulations for the Health Profession Student Loan Program and the Nursing Student Loan Program will be based on a 5% default standard and that this standard will be calculated on the basis of the number of dollars in default. Dr. Graham had reached an agreement with Patti Tyson and Mac Haddow, Office of the Secretary, that these programs would be based on a 5% default standard; however, the schools would be allowed to calculate the default rate on the basis of either the number of dollars in default or the number of borrowers in default. If the regulations are changed as OMB indicates, some of the schools will have a higher default rate. Jack Phelan told Paul Schwab that unless Dr. Graham objects, OS would go along with OMB's recommendation. Dr. Graham has instructed Paul Schwab to tell Jack Phelan that it is Dr. Graham's best professional advice that the Department has done a lot so far to improve the debt management activities of the schools and many of the schools have acted to reduce their level of defaults. Dr. Graham sees no advantage in calculating the default rate on the basis of dollars only. To do so may cause the schools to believe that the Department is changing signals mid-stream and may raise unnecessary Congressional interest. Dr. Graham indicated, however, that if OS chooses not to accept his advice, HRSA will not push the issue further and will act to revise the regulations along the lines recommended by OMB.

OMB indicated that if HRSA wants to pursue the following seven items in the Regulatory Plan, the agency will have to submit more convincing information:

1. Elimination and Phase-Out of Hansen's Disease (Leprosy) Special Pay for Civil Service Employees (NPRM)
2. Competitive Service Status for Indians (Prerulemaking Activity)
3. Review of Qualification Standards for Indians in the Excepted Service in the Indian Health Service (Prerulemaking Activity)
4. Indian Health Service (IHS) Eligibility Criteria (Prerulemaking Activity)
5. Increase in Medicaid Reimbursement for Services Delivered to Indians (Prerulemaking Activity)

6. Options for Indian Health Service (IHS) Billing for the Cost of Care Provided by IHS (Prerulemaking Activity)

7. Funding of Contracts under P.L. 95-398 (Self Determination and Educational Assistance Act) (Prerulemaking Activity)

Faye Iudicello indicated that OMB would not expect to include the following six items in the Administration's Regulatory Plan and the agency may wish to reconsider the plan to develop any regulations in these areas:

1. Organ Transplant Program (Prerulemaking Activity)

2. Reconceptualization of Shortage Area Designation (Prerulemaking Activity)

3. Health Maintenance Organizations Program Review (Prerulemaking Activity)

4. Relationship Between Federal Programs and Changes in Infant Mortality Rate/Low Birth Weight (Prerulemaking Activity)

5. Standards for the Accrediation of Education Programs for the Credentialing of Radiologic Personnel (Final Rule)

6. Reasonable Volume of Uncompensated Services to Persons Unable to Pay (Hill-Burton -- Nursing Homes) (Prerulemaking Activity)

We should probably not object to the OMB decision on the first four items listed above in the Administration's Regulatory Plan. These items were included in the HRSA Regulatory Plan because of the uncertainty as to the activities of interest to OMB. HRSA only plans to study these items at this point and has no plans to issue regulation regarding these during the period covered by the Regulatory Plan.

We have already submitted a final rule regarding the radiological health personnel standards to ES/OS. The regulations were developed in response to a statutory requirement sponsored by Senator Jennings Randolph who has subsequently retired from Congress; no current congressperson has the same level of interest in pursuing this issue. A legislative proposal is being considered to seek repeal of this statutory requirement. Regulation of radiologic health personnel and their training programs is traditionally a State, not Federal, function.

We have a commitment to submit a report to Congress dealing with the issue of whether nursing homes should be treated differently from hospitals in their uncompensated care obligations. The report will not commit the Department to issuing regulations, but OMB has eliminated our options.

HRSA has made a commitment to submit revised information regarding the seven items that OMB indicated that they would most likely include in the Administration's Regulatory Plan to ES/OS by March 26. In addition, HRSA will submit revised information concerning the other seven items that OMB indicated that HRSA may wish to pursue if the agency determines to pursue these items.

We will provide you with additional information concerning OMB's review of the other portions of the PHS Regulatory Plan as this information becomes available.

Bob Spencer

Bob Spencer
PHS Regulations Officer

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Question for Gary Bass (from Senator Durenberger):

Mr. Bass, let me put myself in OMB's shoes for a minute and ask you whether or not it's true that the bill Senator Levin and I have introduced would really just add up to a lot of paperwork and make a lot of lawyers happy? Or, is this bill really going to improve public and congressional access?

Answer from Gary Bass:

The regulatory review process created by Executive Orders 12291 and 12498 vests an enormous amount of power in the Office of Management and Budget. It enables OMB to shape basic federal policies and programs. Therefore, it is essential that the public, Congress, and the courts have access to the process.

OMB's record of disrespect for the rights and interests of the public, the perogatives and requirements of Congress, and the orders of courts necessitates legislation which can open up the regulatory review process. Nothing less will do.

The "Rulemaking Information Act of 1986" proposes a number of procedural solutions to some of the worst abuses of E.O. 12291 and E.O. 12498 regulatory review -- secret review, conduit communications, and delay. The requirements for public files, notice and disclosure will, at least, give the public, Congress, and the courts a better picture of administrative decision-making under the two Executive Orders. Hence, your bill does not just make more paperwork. It does improve public and congressional access.

However, because the bill is so specifically referenced to the two Executive Orders -- sections 2,3, and 6 respond to E.O. 12291 and section 4 responds to E.O. 12498 -- it basically legitimizes them. It expresses absolutely no substantive principles regarding the propriety of presidential regulatory review or the parameters of administrative decision-making. In the face of such silence, the statement in section 7 that the bill does not authorize or require any regulatory review scheme has little effect.

Moreover, the limited scope of the bill misses a critical aspect of the E.O. 12498 Regulatory Planning Process -- OMB review of pre-rulemaking activities. Your bill, like the APA, is geared to a formal proposed rulemaking stage and thus ignores the now critical stage of "pre-rulemaking" review. The result is that OMB remains free to secretly control agency decision-making.

While the bill would improve the status quo, it would more importantly articulate congressional acceptance of the present Regulatory Planning Process and the President's

ABILITY TO DEFINE THE FRAMEWORK, IF NOT CONTENT, OF ADMINISTRATIVE DECISION-MAKING. AS A RESULT, IT IS UNLIKELY THAT THERE WILL BE BROAD PUBLIC AND CONGRESSIONAL SUPPORT FOR YOUR BILL.

I RECOGNIZE THAT I AM CRITICIZING AN EFFORT TO IMPROVE A SORRY SITUATION. THIS IS UNFORTUNATE, BUT NECESSARY GIVEN THE HIGH STAKES INVOLVED. LET ME MAKE THREE POINTS THAT LEAD ME TO THIS POSITION.

EXECUTIVE ORDER 12291 -- "FEDERAL REGULATION"

PRESIDENT REAGAN'S FIRST REGULATORY REVIEW INITIATIVE, EXECUTIVE ORDER 12291 (ISSUED 2/17/81), REQUIRED THAT "MAJOR" RULES CONFORM TO ECONOMIC COST/BENEFIT STANDARDS. THIS WAS, TO SOME EXTENT, AN EVOLUTIONARY EXPANSION OF REGULATORY REVIEW PROCEDURES DEVELOPED UNDER PREVIOUS PRESIDENTS.

IN RETROSPECT, E.O. 12291 APPEARS TO HAVE BEEN AN IDEALISTIC, IF SHORTSIGHTED AND NAIVE, ATTEMPT TO MAKE SOCIAL REGULATIONS COST EFFECTIVE. IN PRACTICE, THE FORMAL COST-BENEFIT REVIEW HAS BEEN LESS IMPORTANT THAN THE DELAYS AND OPPORTUNITIES FOR HIDDEN INDUSTRY PRESSURE, WHICH THE E.O. 12291 PROCESS PERMITS.

EXCUTIVE ORDER 12498 -- "REGULATORY PLANNING PROCESS"

EXECUTIVE ORDER 12498 (ISSUED 1/4/85) WAS A CLEAR ATTEMPT BY OMB TO REMEDY THE "SHORTCOMINGS" OF E.O. 12291. OMB DID NOT WANT TO CLOSE THE INFORMAL LOOPHOLES, AS MUCH AS DO AWAY WITH ITS FORMAL LIMITATIONS. IT:

1) INCREASED THE SCOPE OF REVIEW TO INCLUDE PRE-RULEMAKING ACTIVITIES AS WELL AS PROPOSED AND FINAL RULES;

2) EXPANDED THE STANDARDS OF REVIEW TO THE ALL-INCLUSIVE "CONSISTENT WITH THE ADMINISTRATION'S POLICIES AND PRIORITIES;"

3) SUBSTITUTED MANDATORY COMPLIANCE FOR THE POWERS OF PERSUASION (HORTATORY COMMENTS, DELAY, AND INFORMAL PRESSURE); AND

4) PROHIBTED DISCLOSURE OF INFORMATION RELATING TO THE REVIEW OF AGENCY REGULATORY ACTIVITIES (SEE OMB BULLETIN NO. 86-4, SEC. 5(F), 12/23/85).

THESE FACTORS COMBINE TO VEST OMB WITH AN ENORMOUS, AND UNPRECEDENTED, DEGREE OF CONTROL OVER AGENCY ACTIVITIES. E.O. 12291, WHICH PEOPLE ARE FINALLY COMING TO UNDERSTAND, IS DWARFED BY THIS COMPREHENSIVE REGULATORY PLANNING PROCESS.

The Administrative Procedure Act

Congress passed the Administrative Procedure Act (APA), 5 USC 551, et seq., in 1946 to insure that agency decision-making is fair and reasonable. The APA provides minimal procedural requirements to guarantee public access to the rulemaking process and sets standards for judicial review of the final rules and the rulemaking process.

Over the years the APA procedures have been modified by program legislative requirements, court decisions, and agency procedural innovations. Still, the APA has remained the basic standard by which agency action is judged and public accountability maintained.

The E.O. 12498 Regulatory Planning Process effectively supersedes the APA by subjecting agency activities to hidden review before the APA rulemaking process is even begun. It is ludicrous to talk, as have OMB officials, of agency discretion and responsibility to conduct APA rulemaking and fulfill legislative requirements when OMB can secretly force agencies to conform to OMB's vision of the Administration's policies and priorities.

Conclusion

The proposed "Rulemaking Information Act of 1986" would provide more public and congressional access to the regulatory reivew process created by Executive Orders 12291 and 12498. However, to properly address the issues raised by the Executive Orders:

1) Congress must recognize that, despite OMB's claims to the contrary, the fundamental purpose and ultimate effect of regulatory review by the Executive Office of the President is to control agency decision-making; and

2) Congress must clearly articulate standards for administrative decision-making that take into account --
   - o statutory and judicial requirements for agency action,
   - o legislative discretion vested in agencies,
   - o executive review of agency decisions, and
   - o public participation, congressional oversight, and judicial review of agency and executive decision-making.

Legislative reform efforts must explicitly address the administrative decision-making process in a comprehensive manner. If they do not, OMB is basically left free to determine the limits of its own power.

STATEMENT OF
STEVEN KARGMAN
BEFORE THE
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
January 28, 1986

Mr. Chairman and Members of the Subcommittee, my name is Steven Kargman. I am chairman of Yale Legislative Services of the Yale Law School, a non-profit organization which provides legislative research services for local, state, and national legislators. I am testifying in my own behalf today. I am also the author of a forthcoming Note which will be published in The Yale Law Journal on the topic of Office of Management and Budget ("OMB") involvement in agency rulemaking and the implications for the judicial review process. I appreciate the opportunity to discuss before the Subcommittee the OMB review/judicial review relationship as well as the proposed legislation, the Rule Making Information Act of 1986.

I. OMB Intervention in Agency Rulemaking and the Problems for Judicial Review

President Reagan's adoption of Executive Orders 12,291 and 12,498 ("E.O. 12,291" and "E.O. 12,498," respectively) has given OMB a central role in agency rulemaking. OMB has exercised its authority, however, in a way that threatens to erode effective judicial review of agency rulemaking. Since OMB involvement is typically not reflected in the administrative record submitted for judicial review,[1] courts will be frustrated in their efforts to conduct meaningful review of agency rulemakings where there has been significant OMB involvement. In general, the involvement of OMB in agency rulemakings can endanger crucial public policy objectives in administrative law, including reasoned decisionmaking by agencies and access to the rulemaking process by all parties.

E.O. 12,291 permits OMB to have wide-ranging influence on agency rulemakings, primarily by giving OMB the authority for pre-publication clearance of agency rules. Since the adoption of E.O. 12,291, OMB has in fact exercised its authority broadly in several major rulemakings concerning, for example, the use of asbestos, the operation of underground hazardous waste tanks, the notification of workers regarding hazards at the workplace, the level of allowable air pollutants, the distribution of infant formula, and the maintenance of water quality. In these cases and others, OMB has forced agencies to withdraw proposed rules, seriously delayed the publication of proposed rules, and weakened rules on the basis of cost/benefit criteria which in certain instances were precluded from agency consideration by statute.

Despite its broad de facto authority under E.O. 12,291, OMB has made itself essentially unaccountable for its involvement in the administrative process. This unaccountability stems from the fact that OMB involvement is largely kept secret from the public since there is no disclosure of this involvement in the administrative record. Without such disclosure, it is difficult for an aggrieved party to go into court to challenge an agency action on the basis of improper OMB influence. During the course of an administrative rulemaking, OMB officials will engage in numerous telephone conversations and meetings with agency officials, and yet public disclosure of these communications may be virtually non-existent. In addition, OMB staff members may receive secret communications from private parties concerning a rulemaking, and OMB may subsequently serve as a conduit for these private party communications to the agency.

The effect of these undocumented communications is to generate two possible records: a public one reflecting what happened during the agency's rulemaking proceedings and a secret one reflecting what happened between the agency and OMB. In the past, only the former record existed which encompassed agency findings as well as the contributions from public participation in the rulemaking process. This package was submitted by the agency for judicial review when agency action was challenged in the courts. Under traditional judicial review doctrine, the scope of review was limited to a "review on the record"; that is, courts generally do not undertake de novo review of agency rulemaking but rather confine their review to the administrative record on which the decision was made.

The presence of OMB interventions into agency rulemakings threatens to make review on the record of these rulemakings a meaningless exercise. Review on the record is not a viable approach where there are unrecorded OMB interventions. If review on the record were applied where there is active OMB involvement in a rulemaking, the courts would be presented with a distorted perspective of how the agency reached its final decision. The courts would see only the record reflecting what happened during the agency's public proceedings. However, the courts would not see any documents reflecting what happened between the agency and OMB since these communications would not be included in the administrative record. By thus limiting themselves to review on the record, courts would be focusing on public proceedings which may be irrelevant and indeed mere window-dressing given that the critical dynamic in E.O. 12,291 rulemakings concerns the nonpublic communications between OMB and the agency.

In other words, OMB interventions into agency rulemakings could potentially paralyze the traditional judicial review mechanism for challenged administrative decisions. Nevertheless, judicial review can remain effective in the face of OMB involvement in agency rulemaking if the courts conceive of the process of OMB-influenced rulemakings as involving various sets of interactions between the agency and OMB. The first set of interactions relates to the flow of communications from the agency to OMB surrounding a proposed rule. These communications can reveal how the agency would have acted in a given rulemaking if the agency alone were promulgating the rule; this might indicate how the agency would have acted but for OMB intervention. The reason courts should focus on these communications relates to the traditional judicial concern with "danger signals" in agency rulemakings which the courts define as abrupt shifts in agency policy. These danger signals may suggest that the agency is acting in an arbitrary manner. Where the courts find danger signals, they take a closer look at agency rulemaking and require the agency to supply a reasoned analysis indicating why it is reversing previous policies and standards.

Courts should also attempt to isolate this interaction because at this starting point in the OMB-influenced rulemaking, they would probably be most willing to defer to the tentative administrative decision. At this stage of the E.O. 12,291 rulemaking process, courts could rely on presumptions of agency expertise, the procedural regularity of the administrative process, and full public discussion and participation in the rulemaking. By contrast, later in the E.O. 12,291 process, these presumptions lose much of their validity.

The second set of interactions covers OMB communications to the agency. These communications to the agency represent the crux of the E.O. 12,291 process since they relate to OMB review of proposed rulemakings. The courts should focus on this interaction for several reasons. First, this interaction may evidence the factors that OMB brought to bear on the rule ultimately adopted by the agency. The courts will want to compare these factors with the factors mandated by statute to determine whether the ultimate agency rule can survive the "arbitrary and capricious" standard of review. Second, since OMB wields substantial political clout within the Executive Branch, it may attempt to exert raw influence that is plainly unlawful. Finally, only by knowing the OMB position on a rulemaking can courts usefully apply a danger signals analysis.

The third set of interactions concerns OMB contacts with outside parties during rule review. Private party communications to OMB may be viewed as _ex parte_ contacts between these parties and OMB. Where OMB acts as a conduit to the agency for these _ex parte_ contacts, the ultimate rule issued by the agency may therefore be influenced by these contacts.

In short, courts must pierce the veil of agency rulemaking if judicial review is to remain effective where there is OMB involvement in the administrative process. The courts should reach these three crucial sets of interactions through a process of broadened record review, or judicial scrutiny which goes beyond review on the record. Whereas courts typically review the end result of agency rulemaking and the record support for a rule in accordance with the Morgan doctrine,[2] the courts must instead focus on the process of E.O. 12,291 rulemakings as involving the various sets of interactions between the agency and OMB. This approach of piercing the veil is a prerequisite for compiling a complete record for judicial review of an E.O. 12,291 rulemaking.

Such an approach is consistent with the move by the courts in the last decade from a posture of deference vis-a-vis agency rulemaking to the "hard look" doctrine. The hard look approach was endorsed most recently by the Supreme Court in Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.[3] Currently, the doctrine requires that the reviewing court take a hard look at the agency's decision. Where agency action does not survive hard look scrutiny, the judicial response has been invalidation of the rule for failure to pass the "arbitrary and capricious" test.

In E.O. 12,291 rulemakings, courts will have difficulty enforcing the hard look doctrine where the administrative record does not reflect the crucial OMB involvement. Before courts can attempt to apply the hard look to E.O. 12,291 rulemakings, they must ensure that the administrative record adequately reflects communications between the agency and OMB. Otherwise, the courts will be taking a hard look at a record which reveals little about what went into the agency decision. Only when the courts are satisfied that they are reviewing the "whole record," including the various sets of interactions between the agency and OMB, will they be able to undertake the hard look analysis. Therefore, the courts must undertake broadened record review as a necessary condition for hard look analysis.

II. The Rule Making Information Act of 1986 and Judicial Review

The proposed legislation, the Rule Making Information Act of 1986, represents a serious effort to address the problems for judicial review created by OMB involvement in agency rulemaking. The bill incorporates the notion of disclosure of agency-OMB communications. This thrust of the bill is significant given the nature of the various sets of interactions discussed earlier. The bill requires disclosure pursuant to Section 2(a): "At the time an agency takes any action to consider whether to initiate a rulemaking, the agency shall establish a file with respect to such rulemaking." By establishing the trigger for disclosure at this stage at which an agency takes "any action to consider whether to initiate a rulemaking," the bill contains an interesting insight into the E.O. 12,291 rulemaking process. Specifically, OMB can intervene at a very early stage in a rulemaking, even before any notices of proposed rulemaking have been published in the Federal Register. Through these early interventions, OMB can stop regulations and proposed rulemakings dead in their tracks before they have had a chance to advance very far in the rulemaking process. This problem has become particularly acute in those cases where OMB unreasonably delays its review of a proposed rule. This reality of early OMB interventions is further recognized in Section 3 of the bill which requires an agency to publish a list of rules it has withdrawn as a result of OMB influence.

If the disclosure requirements of the bill work as intended, they could facilitate meaningful judicial review of OMB-influenced rulemakings. The disclosure mechanism of the bill is intended to generate information which an aggrieved party could use in court to establish the presence of danger signals in a rulemaking. On the basis of evidence developed by these disclosure requirements of the bill, the party challenging an agency action might be able to establish preliminarily that there is strong reason to believe that the agency substantially altered its position as a result of OMB influence. Therefore, if Section 2 and Section 3 work in practice in forcing agency disclosure, effective judicial review could be significantly enhanced by such congressionally-mandated disclosure.

Where the court finds the presence of danger signals, it should take the appropriate steps to broaden the administrative record so that the court will be reviewing the range of agency-OMB communications involved in the particular case. Despite the Supreme Court's general prohibition against extra-record evidence, the lower courts have developed many exceptions to the formulation of Citizens to Preserve Overton Park v. Volpe[4] and Camp v. Pitts[5] by allowing evidence from outside the administrative record as defined by the agency under a range of circumstances. These exceptions form the basis for broadened record review in the E.O. 12,291 context.

One important exception involves cases where evidence considered by the agency has been left out of the formal record. The concern in these cases is that the agency can "skew the record for review in its favor by excluding from that 'record' information in its files which has great pertinence to the proceeding in question."[6] Another major exception to review on the record reaches agency action that is not adequately explained. Where there is inadequate explanation, the lower courts, building on the Supreme Court's instructions for remand in Overton Park, have accepted new testimony or remanded the case to the agency for further explanation.

The court can handle the process of broadening record review in roughly the same way that it handles discovery requests. Practical problems may arise if the courts of appeals end up supervising discovery. Therefore, in certain cases, it may be necessary to appoint a master or designate a district court judge to supervise discovery.

III. The Primary Public Policy Goals of Reasoned Decisionmaking and Full Public Participation

The proposal for broadened record review builds on judicial precedent but ultimately hinges on two overriding public policy goals in administrative law: reasoned decisionmaking and access by all parties to the rulemaking process. In view of the problems and dangers posed by E.O. 12,291 for the process of judicial review, these two goals make broadened record review a public policy imperative.

A. Reasoned Decisionmaking

Reasoned decisionmaking is a major public policy goal because the administrative process exists as a means to help generate prudent policy choices for the government. The expertise of agencies is considered a major resource of the government for dealing with complex decisions and achieving "comprehensive rationality"; the insistence by courts on reasoned decisionmaking ensures that this expertise will be exercised.

Nonetheless, reasoned decisionmaking is threatened by the E.O. 12,291 rulemaking process. In deregulation cases, the courts have been particularly demanding with respect to the requirement of reasoned decisionmaking. The rationale for this approach is that a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."[7] The courts should extend the deregulation analysis to E.O. 12,291 rulemakings, and in this context the "settled course of behavior" would refer to the agency's intended course of action before OMB influence is brought to bear. Given the original Administrative Procedure Act ("APA") concern with preserving agency autonomy to ensure reasoned decisionmaking,[8] the E.O. 12,291 decision to "deregulate" at the behest of OMB must be subjected to the same degree of judicial scrutiny as the more traditional deregulation cases. The involvement of OMB introduces a foreign element, "extra-agency" control, to agency rulemaking which essentially was rejected by the drafters of the APA when such a proposal was made for a central coordinating agency.[9]

B. Public Participation

Public participation in the administrative process serves important goals. The first is that it brings a broader range of views and experience to a problem, thus enabling an agency to formulate a solution based on better information. The second is that public participation ensures that the agency engages in a dialogue with the public.

In recent years, the courts and Congress have ushered in an interest representation model of rulemaking in which public participation is the linchpin.[10] This "reformation of administrative law," where the agency is viewed as quasi-legislature, has manifested itself in the expansion of standing, the expansion of participation rights before the agency, and the requirement of adequate consideration of all participating interests in decisions on agency policy. Certain "hybrid rulemaking" statutes have also enhanced public participation by combining informal rulemaking procedures with some formal adjudication procedures.[11]

E.O. 12,291 severely undercuts this interest representation model of agency decisionmaking by limiting the effectiveness of public participation. The principle of equal access to the rulemaking process is jeopardized where OMB has a privilege point of entry for affecting the course of agency decisionmaking.[12] Furthermore, if the communications between the agency and OMB are decisive to the agency's final course of action, the agency's conclusions as quasi-legislature may become irrelevant since public participation plays no meaningful role.

Therefore, broadened record review is necessary to preserve public participation by maintaining the vitality of this interest representation model. This approach will accomplish that goal by ensuring that OMB involvement in agency rulemaking is subject to judicial review. Where the range of agency-OMB communications fall under this broadened record review, the agency's public rulemaking proceedings will again assume importance insofar as they serve as a counterpoint to the previously secret agency-OMB communications. Broadened record review means that any improper OMB influence on agency rulemaking will come to light, and the public rulemaking record will no longer serve a window-dressing function in E.O. 12,291 rulemakings. Under this approach of broadened record review, then, public participation rights, which have assumed such significance in the last decade, may effectively be safeguarded from the intrusions of OMB.

IV. Conclusion

OMB involvement in agency rulemaking has significantly altered the administrative process and could lead to an erosion of meaningful judicial review. Courts must develop an appropriate response for dealing with the unique problems which OMB involvement presents for the process of judicial review. The proposal for broadened record review by the courts would preserve the effectiveness of judicial review in OMB-influenced rulemakings. To the extent that Congress can, in practice, successfully mandate disclosure of agency-OMB communications, legislation such as the Rule Making Information Act of 1986 may help facilitate this broadened record review. The proposal for expanded judicial review in the OMB context is necessitated by two overriding public policy goals in administrative law, reasoned decisionmaking and access by all parties to the rulemaking process.

Footnotes

[1] *See, e.g.*, Staff of House Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, 99th Cong., 1st Sess., *EPA's Asbestos Regulations: Report on a Case Study on OMB Interference in Agency Rulemaking* 103 (Comm. Print 1985) (reporting extensive pattern of undocketed communications between industry representatives and OMB as well as between OMB and Environmental Protection Agency in asbestos rulemaking) [hereinafter cited as *Asbestos Report*].

[2] *See U.S. v. Morgan*, 313 U.S. 409, 422 (1941) (Secretary of Agriculture should never have been examined at trial concerning rate-making decision).

[3] 463 U.S. 29 (1983).

[4] 401 U.S. 402 (1971).

[5] 411 U.S. 138 (1973).

[6] *See Environmental Defense Fund, Inc. v. Blum*, 458 F. Supp. 650, 661 (D.D.C. 1978).

[7] *See Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Insurance Co.*, 463 U.S. 29,42 (1983).

[8] *See, e.g.*, M. Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May be Raised by Executive Order 12291*, 97th Cong., 1st Sess. 46-54 (requirement of reasoned decisionmaking traces roots to drafting of APA itself where emphasis was on giving agencies flexibility and autonomy in formulating policy).

[9] *See Report on the Administrative Procedure Act* (Comm. Print 1945), *reprinted in Administrative Procedure Act: Legislative History*, Senate Comm. on the Judiciary, 79th Cong., 1st Sess. 256 (1946) (centralized agency undesirable because "such an office... will be political, will interfere with the independent operations of boards and commissions, [and] will constitute a superadministrative agency").

[10] *See, e.g.*, Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) (describing ways in which agency rulemaking has become increasingly characterized by public participation); Gellhorn, *Public Participation and Administrative Proceedings*, 81 Yale L.J. 359 (1972).

[11] *See, e.g.*, Toxic Substances Control Act of 1976, 15 U.S.C §2605 (1982).

[12] *See Asbestos Report*, *supra* note 1, at 98.

Question for Steven Kargman
(from Senator Durenberger)

Mr. Kargman, let me put myself in OMB's shoes for a minute and ask you whether or not it's true that the bill Senator Levin and I have introduced would really just add up to a lot of paperwork and make a lot of lawyers happy? Or, is this bill really going to improve public and congressional access?

Response of Steven Kargman, Chairman, Yale Legislative Services, Yale Law School, to Question from Senator Durenberger:

In administrative law, procedure often adds up to substance: procedural safeguards protect substantive rights. This is a major thrust of the Administrative Procedure Act, and that is the reason this legislation is an important step in the right direction.

In OMB-influenced rulemakings, the lack of documentation concerning OMB involvement frustrates effective judicial review. Congressionally-mandated disclosure, in conjunction with broadened record review by the courts, can help preserve the substantive rights of parties aggrieved by an agency rulemaking.

In other words, this bill isn't about creating more paperwork at the agencies or producing more cases for lawyers. On the contrary, the consequences of this bill are considerably more significant. The bill's disclosure requirements could produce the documents that will form the basis of meaningful judicial review.

Where a party challenging agency action suspects that there has been improper or unlawful OMB influence on the administrative process, it is absolutely essential that such an aggrieved party have access to information concerning OMB involvement. In a typical OMB-influenced rulemaking, there will be virtually no information in the administrative record concerning this involvement.

Disclosure requirements that work will help preserve effective judicial review of OMB-influenced rulemakings. These requirements will enable the courts to undertake careful scrutiny of the real basis for an agency's decision in these rulemakings. Moreover, these disclosure requirements can work in tandem with the proposal for broadened record review that I advocate as the proper solution to the judicial review problem created by undocumented OMB involvement in the administrative process.

Senator **Durenberger**. Thank you very much.

Let me express my appreciation again to all of you.

Mr. **Safchuck**. As a victim of asbestos, may I say something here?

Senator **Durenberger**. Would you identify yourself?

TESTIMONY OF PAUL SAFCHUCK, NATIONAL PRESIDENT, WHITE LUNG ASSOCIATION

Mr. **Safchuck**. My name is Paul Safchuck. I am the national president of the White Lung Association, and I am also a victim of asbestos.

I have listened to quite a lot of discussion here, and everything, and it just doesn't seem to jibe with the victims. What we want is action. We are dying, and there are millions of us who are going to die from asbestos. The medical profession says that asbestos is the biggest killer in the history of humanity. That means your children and my children, it doesn't make any difference between you and me. You can become a victim just as well as I am. I am a victim of asbestos.

I am going to read a little statement that I have here on behalf of our children and the victims of asbestos.

My name is Paul Safchuck. My doctor has informed me that I am victim of asbestosis. In addition to many other civic duties, I am the national president of the White Lung Association. The White Lung Association is a national, nonprofit, educational organization whose goal is to educate the public about the dangers of asbestos exposure. Most of our members, who number over 10,000, in 22 States, have been hurt by asbestos exposure.

I thank you for inviting us here today to speak on the role of the Office of Management and Budget in the regulatory review process.

I am against any waste in our Government because we have so much waste, and it is our children who are going to pay for it. I have always worked with children, and that we do not want to pass on to our children. But money used to control hazardous and toxic substances such as asbestos is not a waste, by no means. It is not to me and to millions of other victims.

In fact, with toxic hazards such as asbestos, a pinch of prevention, which is the only cure you have once you have the disease, that is what the doctors told me, there is nothing they can do for me. Prevention is worth a hundred pounds of cure because there is no cure.

We did not prevent the chemical waste contamination, and now we have to spend billions and billions of dollars of taxpayers' money moving these waste dumps from one State to the next. What we are doing by moving that, we are just wasting money, and contaminating more sites. We are not correcting it.

We did not prevent the contamination of society with asbestos, and now we are paying a terrible price. Many thousands are dying from it. Children are dying from it. That is a price beyond value. There are over 10,000 deaths a year due to past asbestos exposure, and that is a low figure, I will tell you that. It is more like 40,000 to 50,000. Because I am a victim, research is very important to me.

This figure will continue well into the next century, so that the asbestos will claim more lives of our people than were lost in all the wars, not one war, all the wars.

Where there is a waste of money, it should be stopped. But if there is interference with the health regulations for preventive medicine with the long-term social goals by those whose only concern is to reduce expenditures, not reduce the deaths, this interference must be stopped at all costs.

The Environmental Protection Agency is a weak and ineffective body of our Government. The action of the OMB over the last several years have made this agency even weaker. This, indeed, is a clear example of penny-wise and pound-foolish. What we are doing is saving a penny, but spending eventually, in the long run, a lot more than a pound, I can guarantee you that.

We find it strange that OMB does not look at the total picture when it interferes with the EPA activities. Never do we hear from OMB that it wants to lower the salary or any expense for overpriced fellows like Lee Thomas. We never hear about the cost of failure to regulate.

We, asbestos victims, are a perfect example of the cost of the failure to regulate. If someone wants to help to solve this situation, they should try to see that there is money and resolve to do the job safely, and not to cut the funds, but to see that the money is used correctly.

I want to thank the subcommittee for letting me talk here on behalf of the victims of asbestos and the White Lung Association, and the future victims, who are our children, who are our future nation, of this great country. Without our children, as this button says, "Kids are special people," and don't forget that at one time, you were kids, too.

Senator **Durenberger**. It is hard to believe.

Mr. **Safchuck**. You were kids, too. Our fathers took care of us, let us take care of our kids now, and see that these regulations are done, and done correctly.

Senator **Durenberger**. Thank you very much.

I thank all of you very much. The hearing is adjourned.

[Whereupon, at 1:25 p.m., the subcommittee adjourned.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

[From Senate Report 99-576]

ADDITIONAL VIEWS OF MR. CHILES

As a cosponsor of S. 2433, the "Paperwork Reduction Act Amendments of 1984", and as the Senate sponsor to the Paperwork Reduction Act of 1980, the law which this bill will amend, I want to compliment the Committee on Governmental Affairs' work on this bill. This reauthorization exercise and the amendments in S. 2433 will strengthen the Federal Government's ability to achieve the purposes of the Paperwork Reduction Act. It is a good bill—a sound piece of legislation.

I do want to provide some additional comments on amendments undertaken, supported, and passed by the Committee in which I had a specific role.

First, I want to observe this reauthorization process by the House and the Senate Committee on Governmental Affairs focused more upon what problems existed in the act's implementation since 1981 than upon what accomplishments were obtained. This is a proper focus for Congressional oversight and Congressional oversight is an essential part of the reauthorization process.

However, a perspective should be placed on the achievements. By the end of 1983 some 477 million hours of paperwork requests were eliminated. Time spent fulfilling paperwork requests is used as a proxy measure for cost. At $20 an hour, this amounts to a savings of some $9.54 billion. This savings in and of itself demonstrates the act has made a difference in how the Government works.

But as the experience of the past 3 years reveal and as the hearings by both the House and Senate document, there is much progress yet to be made if the management and accountability structure created by the 1980 Act are to lead to the achievements envisioned by the framers of the Paperwork Act. In my own mind, the ultimate test of the act's success will be when I can travel through Florida and get a sense from the people they feel Government's paperwork demands are not out of control. Despite progress in reducing the burden this has not yet happened to me.

The biggest disappointments of the past 3 years concern efforts by the executive branch to frustrate both the opportunities for meaningful public participation and the mechanisms for accountability to the Congress and the public the law establishes. Several of the amendments contained in S. 2433 are designed to enhance public participation and accountability to Congress.

THE OFFICE OF LEGAL COUNSEL OPINION

The Committee amended the definition of "information collection requests" to include the term "collection of information requirement," a term used in section 3504(h) in the Act. This amendment clarifies what the term "collection of information requirement" was intended to mean when the Act was passed in 1980. A specific intent of this amendment is to establish that the legal opinion issued by the Justice Department in June of 1982 provides an invalid interpretation of the law.

I have previously characterized this opinion as a flagrant example by unelected officials in the bowels of a Federal office building to rewrite and change a law passed by Congress and signed by the President. (Congressional Record, July 1, 1982.) It is an opinion which serves to distort and change the Congressional intent expressed in the Paperwork Reduction Act. Moreover, the opinion causes more problems than it purports to solve.

According to the opinion, its conclusion is based on, among other things, a thorough analysis ". . . of the language and history of section 3504(h), the language and history of the Act's other provisions, and the statutes general scheme . . .". The clarifying amendment to the definition of information collection request makes clear that not only did the opinion reach a false conclusion, it also was based on a selective and false analysis of language and legislative history. Despite its 56 pages, and 101 footnotes, the analysis of the opinion is so flawed, it should not be relied upon for any future efforts to interpret the statute.

The opinion misconstrues the general scheme of the statute. The law was intended to be comprehensive in its coverage of federally sponsored "collections of information." Exemptions to this coverage, either by agency or by class of information were specifically set out in the definitions of section 3502 or the savings provisions of section 3518. The notion the law was dedicated primarily to "forms, questionnaires, and surveys" and not to other instruments such as reporting, recordkeeping, and disclosure requirements which are means to carry out federally "sponsored collections of information" is a fundamental misreading of what the law states, what the Congress of 1980 intended, and what this Committee affirms in the amendments of 1984.

The opinion does not reflect a thorough analysis of either the language or the legislative history of the act's provisions. It is a limited and selective analysis. The scholarship reflected by the analysis is deficient. The following aspects of the legislative history which were not included in the OLC opinion should be considered in any future interpretations of the Act.

1. The Congress used the reports and work of the Federal Paperwork Commission in drafting the law. The Commission's reports on the "History of Paperwork Reforms" and on the "Reports Clearance Process" specifically instructed the Congress on the legal and policy issues associated with the responsibilities contained in the Federal Reports Act and the Administrative Procedures Act. (The OLC opinion did not acknowledge any relationship between the Commission's work and the drafting of the Act.)

2. The Paperwork Reduction Act of 1980 amended the Federal Reports Act of 1942. The Administrative Procedures Act was passed in 1949. These two laws had co-existed for some 30 years. What the history was and most importantly, what the prevailing practice of the executive branch, the General Accounting Office, and independent regulatory commissions were in regards to the laws were known to the Congress when the Paperwork Act was deliberated upon. Much of the language of the 1942 law was deliber-

ately incorporated in the Paperwork Reduction Act in order to preserve the traditional understandings of the authority contained in the 1942 law. (The OLC opinion made no reference to the prevailing practice or understanding of the agencies, the Comptroller General, or the Director of OMB.)

3. In 1973 the Congress amended the Federal Reports Act and required the General Accounting Office to be responsible for clearing the information requests of independent regulatory commissions. The amendment was motivated by a concern over the integrity of the rulemaking process. (How the 96th Congress studied the issues raised and responded to the concern of Congress reflected by the 1973 amendment was ignored by the OLC opinion.)

4. The language of section 3504(h) was part of an amendment proposed by Senator Kennedy and accepted and introduced by Senator Chiles during full Senate consideration of the Act. Senator Kennedy's amendment included amendments to other sections of the Act, including section 3507 wherein substantive language was added requiring all decisions of the Director of OMB to be made publicly available. (The OLC opinion construed Senator Kennedy's amendment and explanatory comments to relate only to the language of 3504(h). This is inaccurate.)

5. The most definitive statement on the relationship of section 3504(h) and information collection requirements to the procedural requirements of other sections of the Act upon information collection requests was made by Senator Kennedy on December 15, 1980. (Congressional Record, December 15, 1980, S 16700.) (The OLC opinion does not acknowledge this explanation.)

Federal agencies will continue to try to find ways, including unfounded interpretations of what Congress intended, to limit the scope of the Paperwork Act's requirements and the assurances the law is intended to provide the public. The Committee's amendment to the definition of information collection requests exposes the attempt which culminated in the OLC opinion of June 1982.

SENATE CONFIRMATION OF THE ADMINISTRATOR OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA)

The Committee amendment to require advise and consent of the Senate in the selection of the Administrator of OIRA is designed to strengthen accountability to Congress.

During development of the 1980 Paperwork Act the Senate agreed to President Carter's request to drop the idea of Senate confirmation of the head of OIRA in exchange for his support of a separate authorization and appropriation account for the office's activities. This administration chose not to abide by what I regard the language of the act to mandate. A separate appropriation account consistent with the separate authorization has not as yet been created. In addition, the issue of how resources have been used and what resources are needed to accomplish the ambitious strategy Congress incorporated in the 1980 Act has been a point of contention between the administration and OIRA's oversight committees in the House and Senate.

The 1984 amendments will require Presidential appointment and Senate confirmation of the head of OIRA in the future. They retain the language which I believe mandates a separate appropriation account. They also require a reporting by function of how resources are to be used by OIRA which will be tied to the annual budget process. Accountability to Congress will be strengthened by these steps.

IMPROVEMENTS FOR PUBLIC PARTICIPATION

The amendment to Section 3507(a)(2)(B) which requires agencies to set forth a title, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response, and an estimate of the burden, is designed to enhance public participation in commenting upon proposed agency requests for information. Since approvals for continuing requests are required every 3 years, this minimum amount of information is particularly important if the affected public is to become a meaningful part of the justification process.

Prior to and shortly after the act's passage the OMB gathered agency notices, complete with the above information, and published them in the Federal Register under OMB auspices. This practice was dropped and agencies were left to their own discretion to meet the acts requirement to give notice in the Federal Register. Testimony from small businesses, individuals, universities, and State and local governments supports the idea that standardizing the requirements for minimal information will improve both the number and quality of comments.

While the Committee amendment does not specifically require OIRA to publish agency notices, I do want to note that the House version of section 3507(a)(2)(B) in 1980 was amended by the Senate at the specific request of OMB. The request was to provide language which would enable all paperwork notices to be aggregated in one location in the Federal Register. At that time the view was that this approach made for more participation by the public in the comment process.

It is my hope that this standardization of what minimal information should be contained in the notices will lead to more thoughtful efforts by the agencies and OIRA to encourage public participation in the process of justifying agency requests.

The Committee amended section 3505 to include the task for the Director of OMB to report to the Congress in a year upon the feasibility and means of enhancing public access, including access by electronic media, to information relating to information collection requests required by the law to be made available to the public.

The administration agreed to this assignment after lengthy discussions on the need to improve public access to the decision making process surrounding agency justification and OIRA review of paperwork requirements. It is my view that with the explosion in computer and telecommunications, technology, great strides can be made in improving the ease upon which persons can access the information relating to decisions on paperwork requirements which are publicly available. OIRA can seize this opportunity to demonstrate how new information technology can be used to expand meaningful public participation in how government makes decisions concerning paperwork burdens. My hope is this opportunity will not be missed.

FEDERAL GRANT PROGRAMS—THE MISSING INVENTORY OF PAPERWORK REQUIREMENTS

The Committee also amended section 3505 to require the Director of OMB identify further initiatives to reduce the burden of Federal collections of information associated with the administration of Federal grant programs.

The intent of this amendment is to continue specific statutory attention to paperwork demands associated with grant programs that was highlighted by section 3505(1)(E) of the 1980 Act, which has expired.

My view is that there remains a large number of federally sponsored reporting and recordkeeping requirements associated with the management and audit of grants which has not been identified and subjected to the discipline of the Paperwork Reduction Act. A major area of requirements which has not been inventoried concerns reporting and recordkeeping demands that result from OMB's own management circulars. Previously, the OMB has taken the position that its circulars constitute policy guidance to the agencies and it is agency implementation of OMB's guidance which is subject to the clearance requirements of the Act. Agencies have found this view easy to ignore. For many reporting recordkeeping requirements which are established by the circulars, this position is inconsistent with the requirements of the Act and inconsistent with the specific regulaton the Director of OMB has promulgated to implement the Act. (See 5 CFR Part 1320.15(b).)

A result has been to confuse recipients of grant programs who seek the assurances of the public protection section of the Act, and to permit agencies to find loopholes in the Act's coverage.

Presently, the OMB is reviewing circular A-102, which deals with uniform administrative requirements to state and local governments. A purpose of this Committee amendment is to highlight a fresh opportunity for OIRA and the other relevant management components of OMB to inventory the burden associated with OMB circulars and grant programs. Many decisions regarding the practical utility of informaton demands relating to the management of some $100 billion of Federal expenditures annually have yet to be made. Again, my hope is OIRA and OMB will seize this opportunity to lead the way and bring about savings to State and local governments, universities, nonprofit institutions, individuals, and other recipients of grant programs.

LAWTON CHILES.

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EMBARGOED FOR RELEASE: 6:00 p.m. E.D.T.
June 13, 1981

Attachment 13

SUMMARY OF REAGAN ADMINISTRATION'S REGULATORY RELIEF ACTIONS

A Report
to the
Presidential Task Force on
Regulatory Relief,
Prepared by the Staff of the
Office of Management and Budget

June 13, 1981

The attached tables reflect a preliminary effort to quantify the regulatory relief initiatives taken between January 20 and April 24. A brief description of the contents of these tables and some useful commentary on their usefulness follow:

1. The tables contain: (a) the items on the Task Force list of rules designated for postponement; (b) the items on the Task Force list of existing regulations to be reviewed; (c) the list of actions to help the auto industry; and (d) other major actions initiated by the agencies themselves.[1] The list does not include regulations allowed to go through during, or at the end of the postponement, or subsequent actions that are not perceived as being in the nature of granting regulatory relief. The list includes a wide variety of actions, some arguably trivial and some very important. Some of the items involve the withdrawal or change of a rule, while others involve only an intention to review.

2. Some type of cost estimate is provided for 57 of the 181 items in the tables. Almost all of the cost estimates are from the agencies, and almost all represent non-budgetary costs. Because of the variety of sources for the estimates, we cannot be sure that they have been derived in a consistent manner. (For example, in some cases there is double counting because annual costs include a share of investment costs in the form of depreciation.) Thus, we look forward to comparing these cost estimates with those provided in response to the Vice President's letter of March 25.

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[1] Vice President Bush, Chairman of the Presidential Task Force on Regulatory Relief, announced items (a) and (b) on March 25; and announced item (c) on April 6.

3. The totals--$15.5 to $18.6 billion in one-time costs and $5.5 to $6.0 billion in recurring costs --are large. However, it should be stressed that they are not precise. On the one hand, since there are no estimates for 70 percent of the items, we might assume that the total is low, even allowing for the fact that many of the items for which no estimates are available are trivial. On the other hand, except for the auto package items, the cost estimates generally represent potential savings if the regulation were entirely eliminated; since, in many cases, the regulation may go forward in modified form, the actual savings could be lower.

4. The largest potential savings estimates are for the Department of Transportation and the Environmental Protection Agency. Somewhat surprisingly, the majority of the savings are for items not included in the auto package: EPA items not in the auto package account for $3.4 billion in one-time costs and $1.3 billion in recurring costs; DOT items not in the auto package account for $8.7-$9.7 billion in one-time costs and about $400 million in recurring costs.

Table 1:

SUMMARY OF REGULATORY RELIEF INITIATIVES
JANUARY 20 TO APRIL 24

Agency	Number of Regulations	Number of Regulations With a Cost Estimate	Annual (Recurring) Cost (millions)	Investment (One-Time) Cost (millions)
USDA	5	3	$ 602-610	$ NA
Commerce	10	3	20	3
Education	5	1	72-157	900-2,950
Energy	6	1	500	NA
EPA	27	19	2,118 a/	4,327 b/
HHS	4	0	NA	NA
HUD	31	0	NA	NA
DOI	12	1	0	NA
Justice	3	0	NA	NA
Labor	18	10	913-1,298	1,087
OMB	3	0	NA	NA
DOT	55	19	1,289	9,204-10,204
Treasury	2	0	NA	NA
	181	57	$ 5,514 to $ 5,992	$ 15,521 to $ 18,571

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a/ This estimate does not include the $1 billion to $2 billion savings which could result from EPA's review of the Hazardous Waste Disposal regulations.

b/ Same as above footnote, except that this estimate includes a $1.5 billion savings which would occur if EPA substantially modified its BCT effluent guidelines.

TABLE 2:
REGULATORY RELIEF ACTIONS INITIATED BY THE NEW ADMINISTRATION, JANUARY 20 TO APRIL 24

DEPARTMENT OF AGRICULTURE

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Wheat and Wheat Foods Research Education Order Provides for system of information collection to be used in assessing fees to support industry research and education activities. (46 FR 32572)	After consultation with OMB, final rule will be published, but information requirements will not be effective until cleared by OMB.	2 to 10	NA	
All Fruit and Vegetables Marketing Orders 47 marketing orders establish production and marketing controls for a variety of fruit, vegetable, and other crops. (CFR 900-945)	On Task Force list of existing regulations to be reviewed.	NA	NA	Annual operating budgets for the orders are $67 million.
Revision and Redesignation of Section 502 Rural Housing Loan Policies, Procedures, and Authorization Provides for increased lending (interest subsidized loans) to moderate-income home buyers. (46 FR 4681)	On Task Force list of rules designated for postponement. Suspended for further review.	500	NA	The $500 million cost estimate refers to federal budget obligations.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Mechanically Processed (species) Product - Establishes standards for mechanically deboned meat products, including labeling requirements, protein and fat content requirements, and use limitations. (43 FR 26416).	On Task Force list of existing regulations to be reviewed.	100	NA	Cost estimate made by industry of $1 billion per annum. USDA is responding to meat industry petition for review of this rule.
National Forest Service Planning Regulations Regulations establish standards and guidelines for land and resource management planning on 191 million acres of National Forest System lands. (44 FR 53928)	On Task Force list of existing regulations to be reviewed.	NA	NA	

TABLE 2 continued

DEPARTMENT OF COMMERCE

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Federal Interaction With Voluntary Standards Bodies; Procedures - Prescribes procedures for (1) the listing and delisting of organizations setting voluntary standards eligible for Federal agency support and participation and (2) a DOC sponsored dispute resolution service for procedural complaints against listed voluntary standards bodies. (46 FR 19266, 46 FR 1574, 46 FR 19227, 46 FR 11657)	On Task Force list of rules designated for postponement.	19.7	NA	
Clarification of the Validity Period for Emergency Licenses - Would amend Export Administration Regulations by adding a sentence which states that extensions of emergency license validity periods will not be approved.	DOC decided not to publish this rule after consultation with OMB.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Notice of Adjustment in Yellowtail Flounder Catch Limitations-- from the management area west of 69,W longitude.	The proposed notice was withdrawn after consultation with OMB and is being re-written.	NA	NA	
Atlantic Mackeral Fishery of the Northwest Atlantic Ocean Announces availability of amendment to manage-ment plan.	The proposed notice was withdrawn after consultation with OMB and has been re-written and published.	NA	NA	
The Channel Islands National Marines Sanctuary Establishes limitations and prohibitions on the Sanctuary, the procedures by which persons may obtain permits for prohibited activities and the penalties for committing prohibited activities.	On Task Force list of rules designated for postponement.	NA	NA	A major issue requiring review is the impact of the rule on the development of hydrocarbon energy sources. The portion of the rule dealing with this issue will remain frozen until further review is completed.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
The Point Reyes-Farallon Islands National Marine Sanctuary Establishes limitations and prohibitions on the activities regulated within the Sanctuary, the procedure by which persons may obtain permits for prohibited activities, and the penalties for committing prohibited activities.	On Task Force list of rules designated for postponement.	NA	NA	A major issue requiring review is the impact of the rule on the development of hydrocarbon energy sources. The portion of the rule dealing with this issue will remain frozen until further review is completed.
Regulations Implementing Various Fishery Management Plans The National Marine Fisheries Service issues rules for the management of fisheries off the U.S. Coast, primarily to prevent "overfishing."	On Task Force list of existing regulations to be reviewed.	NA	NA	While these rules have been successful in sustaining the fisheries, in many cases they may require inefficient and wasteful fishery methods. Accordingly, selected rules will be reviewed.
Reindeer and Fox Hunting on Pribilof Islands, Alaska. The regulation controlled the hunting of reindeer and foxes on the Pribilof Islands.	Notice of Revocation was published in the Federal Register (46 FR 20557).	NA	NA	National Marine Fishery Service no longer claims jurisdiction over reindeer and foxes on these lands.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Preliminary Survey of International Leasing Transactions in 1975. The regulation provided authorization for an annual survey of leasing activity.	Notice of Revocation was published in the Federal Register (46 FR 16892).	0	.045	Regulation was revoked because the preliminary survey findings did not warrant continuation of the survey.
Foreign Direct Investment in the United States Survey Regulation. Regulation provided legal authorization for a single-time survey of Foreign Direct Investment.	Notice of Revocation was published in the Federal Register (46 FR 16892)	0	3	Regulation is no longer necessary.

TABLE I continued

DEPARTMENT OF EDUCATION

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Assistance to States for Education of Handicapped Children This is an interpretation of the Education of the Handicapped Act and Section 504 of the Rehabilitation Act of 1973. This interpretation specifies that schools should provide catheterization service during the school day. (46 FR 4912)	On Task Force list of rules designated for postponement.	NA	NA	
Education of Handicapped Children The regulations to implement the Education of Handicapped Children Act of 1975 (P.L. 94-142) define a special education program for handicapped children, involving an individual education plan for each handicapped student and the concept of "mainstreaming." (34 CFR 300)	On Task Force list of existing regulations to be reviewed.	NA	NA	While the Department does not have an estimate of the cost of complying, school districts are concerned that Federal funds for this program are inadequate.
Nondiscrimination on the Basis of National Origin (Lau) Prescribes transitional bilingual education for children with limited English proficiency (45 FR 52052)	Withdrawn.	72-157	900-2950	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Financial Assistance to Local and State Agencies and Local Education Agencies to Meet Special Education Needs The program provides grants to State and local education agencies for children with special educational needs. (46 FR 5136)	Amendments to final regulation.	NA	NA	
Notice of Intent to review and amend certain regulations and interpretations Secretary of Education announced his intent to review and amend certain regulations taking effect March 10, 1981. Action taken is to analyze regulatory burden and identify opportunities for deregulation. The comment date for most of the regulations is September 15, 1981. (46 FR [illegible])	Published March 27, 1981.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT ONE-TIME) COST	COMMENTS
Standby Emergency Energy Conservation Plan - This plan consisted of three proposed energy conservation measures (a compressed work-week, vehicle use sticker, employer-based commuter and travel measures) and four interim rules (speed limit enforcement, some employer-based commuter and travel measures, odd-even day purchases and mandatory temperature restrictions)	Proposed rules withdrawn and notice of proposed rulemaking to remove interim final rule published in the Federal Register (46 FR 13577).	NA	NA	
Coal Conversion Program A complex set of rules implementing a statute which directs electric utilities and large industrial fuel users to switch from oil and gas to coal or some alternative fuel. The statute includes a prohibition of natural gas for baseload power generation after 1990.	On Task Force list of existing regulations designated for review.	NA	NA	Budget zero'd for 1982.

TABLE 2 continued

DEPARTMENT OF ENERGY

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Emergency Building Temperature Restrictions. Rules restricting heating, cooling and hot water temperature settings in non-residential buildings.	Proclamation 4820 February 17 (46 FR 12941) Abolishes restrictions and allows operators of non-residential buildings to choose the methods of conserving energy that best fit their circumstances.	NA	NA	
Consumer Appliance Energy Standard The 1980 proposal would have required procedures to redesign, by 1986, virtually all existing models of these appliances and to retool their production line.	Notice of Intent not to issue standards until further study was published in the Federal Register (46 FR 13517).	500	NA	

RULE	STATUS	ANNUAL (RECUR-RING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Residential Conservation Service - These regulations implement a statute which requires the States to have utilities provide to residential customers, for a nominal fee, a complete "energy audit" of their home or apartment pointing out ways to conserve energy.	On Task Force list of existing regulations designated for review.	NA	NA	Budget zero'd for 1982.
Price and Allocation Regulation - Crude oil, gasoline and propane price and allocation regulations, and similar standby regulations for other defined products were promulgated under the Emergency Petroleum and Allocation Act of 1973.	Issued April 3 (46 FR 20508)	NA	NA	Implements the President's January 28, 1981, Executive Order exempting crude oil and refined petroleum products from price and allocation regulations and revokes those regulations made unnecessary by the Order. Only those crude oil regulations necessary for meeting U.S. obligations under the International Energy Programs are retained on a standby basis.

ENVIRONMENTAL PROTECTION AGENCY

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
BCT Effluent Guidelines				
Under the 1977 Amendments to the Clean Water Act, EPA is required to consider the reasonableness of costs in establishing more stringent effluent limits for industrial dischargers of conventional (non-toxic) pollutants in relation to comparable municipal costs. Under these requirements, EPA established the incremental cost of achieving a more stringent treatment of municipal wastewater as a benchmark for determining the "reasonableness" of more stringent controls for industrial dischargers. However, recent analysis indicates that EPA's methodology may be incorrect.	On Task Force list of existing regulations to be reviewed. (46 FR 15287)	400	Up to 1,500	May result in revisions to BCT guidelines for secondary industries (e.g., food, dairy) issued in August 1979 and final guidelines for the pulp and paper industries NPRM, January 6, 1981.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Hazardous Waste Disposal Regulations				
These rules establish a comprehensive, "cradle-to-grave" program governing the generation, handling, and disposal of hazardous wastes. Several major issues deserve review, including the comprehensive definition of hazardous waste under the rules and the limited extent to which EPA has been able to vary program requirements based on the degree of hazard of the waste. This program will impose a substantial burden in terms of the time, effort, and financial resources required of the private sector in meeting the information requirements imposed by the program. (40 CFR 260 to 265)	On Task Force list of existing regulations to be reviewed.	$1-2 billion annually (one-time + annual)		Cost figures are speculative in absence of thorough regulatory analysis of the program.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST	COMMENTS
Electroplating Pretreatment and General Pretreatment Standards				
Electroplating pretreatment rules establish national, technology-based standards requiring roughly 90 percent removal of the toxic pollutants discharged by the electroplating industry into municipal sewage treatment systems. In addition to the categorical electroplating pretreatment standards, EPA promulgated general pretreatment regulations requiring municipal sewage treatment systems to establish pretreatment programs. These regulations establish a national program for controlling industrial discharges into municipal sewage systems. EPA will review its pretreatment program to evaluate whether it appropriately balances environmental protection, economic impacts, and flexibility for states and localities. (40 CFR 403 and 40 CFR 413)	On Task Force list of existing regulations to be reviewed.	690	1900	Cost estimates are for the electroplating rules only.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Amendments to General Pretreatment Standards				
These amendments modify an earlier program for controlling industrial discharges into municipal sewage systems. The amendments will be postponed pending further examinations of the existing program. (46 FR 9404).	On Task Force list of rules designated for postponement.	NA	NA	
Timber Products Effluent Guidelines				
On January 26, EPA promulgated best conventional pollutant control technology (BCT) effluent limitation for categories of the timber industry. Pending EPA's current review of the economic methodology for determining the reasonableness of BCT standards, it is appropriate to postpone the BCT guidelines. (46 FR 8260)	On Task Force list of rules designated for postponement.	NA	20	Only BCT being reconsidered. BAT will go into effect.
Deferral of Noise Regulations				
EPA delayed by one year the date on which noise emission standards for trucks and garbage trucks will be lowered (tightened).	Final Rule published in Federal Register. (46 FR 8497)	150	NA	The Administration's budget request includes no funds for EPA noise regulation beyond FY 1984.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Suspension of Enforcement of Noise Regulations				
EPA suspended enforcement of noise emission standards for garbage trucks, to allow reconsideration of issues raised in a petition brought by manufacturers before D.C. Circuit Court of Appeals.	Notice of suspension of enforcement, February 19, 1981. (46 FR 12975)	NA	NA	The Administration's budget request includes no funds for EPA noise regulation beyond FY 1982.
Liberalization of the "Bubble" Policy in Air Pollutant Abatement				
EPA expanded the number of sources that can use a bubble approach to control pollution by agreeing to approve the use of a bubble policy without reviewing each separate bubble transaction proposed by a State. Under this new policy, EPA issued a hydrocarbon bubble for New Jersey.	Final Rule, April 6, 1981. (46 FR 20551)	NA	NA	"Bubbles" involve allowing a source to increase emissions of one point if emissions are reduced at other points to offset the increase. In effect, EPA regulates total emissions from an imaginary bubble over the entire plant, rather than regulating each individual point of emission.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Approval and Promulgation of Nonattainment Area Plans; Ohio In a separate action, EPA approved the first bubble for fugitive dust emissions, for an ARMCO steel plant in Middletown, Ohio. Fugitive dust bubbles may have widespread application in the steel industry and generate major cost savings.	Final Rule, March 31, 1981. (46 FR 19468)	15	NA	Deregulatory

The following are actions that EPA intends to take to help the U.S. Auto Industry.

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Statutory HC and CO Standards for Heavy Trucks EPA intends to revise the 1984 model-year hydrocarbon and carbon monoxide standards for heavy trucks to a level that would not require the use of catalysts on gasoline-powered heavy trucks.	Intent to publish a NPRM for revision on this action by September 1981.	107.2	108	Industry says that this action would save $110 million. General Motors estimates $900 per engine in consumer savings.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Relax the 10 percent Acceptable Quality Level to 40 percent for assembly line testing of light trucks and heavy duty engines				
Exhaust emission regulations that take effect in the 1984 model year specify that light trucks and heavy-duty engines must not exceed a failure rate of 10 percent during assembly line testing. EPA intends to relax the standard to a 40 percent failure rate. This is the rate presently allowed for passenger cars.	Intent to publish a NPRM for revision by September 1981.	25.8	19	International Harvester estimates it will save $14 million by this action.
Assembly line testing for heavy trucks				
EPA intends to delay for two years all assembly line testing of 1984 and later model year heavy duty engines for exhaust emissions.	Intent to publish a NPRM for revision by September 1981.	12.8	57	Chrysler claims a savings of $3 million for this change; General Motors $44 million, International Harvester $66 million.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
The NOx emissions limit for heavy trucks EPA intends to propose a three year NOx standard for all heavy-duty vehicles that represents the level that can be achieved by diesel engines. However, EPA will not propose the heavy-duty NOx emission standard until May 1982.	Intent to publish a notice in April announcing the delay of a public hearing on this matter.	112.6	150	
Emission averaging for diesel particulate emissions EPA will propose alternative diesel particulate averaging schemes to replace the individual-vehicle standards currently in place for 1985. Averaging should allow manufacturers to employ the most cost-effective control technology strategies for their diesel models, while assuring that total particulate levels will not significantly increase beyond those allowable under current regulations.	Intent to publish a NPRM to propose alternative schemes by September 1981.	104.6	60	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST [millions of dollars]	INVESTMENT (ONE-TIME) COST [millions of dollars]	COMMENTS
The 1984 high altitude auto emission standards The Clean Air Act currently requires that 1984 model-year cars meet applicable emission standards at all altitudes. EPA will request that Congress eliminate this requirement.		260	38	Requires amendment to Clean Air Act. Ford estimates that this change will save them about $50 million with a savings to consumers of $500 million.
Self-certification for vehicles sold at high altitude Under existing regulations, vehicles to be sold at designated high-altitude areas must undergo prescribed high-altitude certification testing. (45 FR 66984, October 8, 1980.) EPA intends to substitute a program under which manufacturers self-certify that their vehicles will meet applicable standards. As an alternative to certification, EPA will increase its emphasis on monitoring in-use vehicles at high altitudes to verify compliance with standards.	Regulations accomplishing these changes will be promulgated by April 15, 1981.	0.2	1	Would save manufacturers the time and expense of transporting test cars to high altitude areas and eliminate scheduling problems.

TABLE 4 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Use of onboard control technology for refueling emissions EPA is charged with determining the feasibility and desirability of requiring motor vehicles to be equipped to control hydrocarbon emissions during motor vehicle fueling. (Section 202 a)(6) of the Clean Air Act.) EPA has decided not to require motor vehicles to be equipped with this technology.	The Agency's findings will be published in the Federal Register in June 1981.	240	103	Industry says that this action would save consumers $1.5 billion.
Annual number of assembly line test orders EPA will reduce the number of selective enforcement audit (i.e., assembly line) test orders to the maximum degree consistent with maintaining approximately the current level of compliance.	EPA has already implemented a schedule reducing the number of test orders by 22 percent for model year 1981, and 25 percent for model year 1982, assuming no significant increase in industry noncompliance with exhaust emissions standards.	0.2	1	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Standards for paint shops EPA will discuss with the States changes in their State Implementation Plans (SIPs) which, subject to their willingness to submit revisions of plans, would have the effect of not requiring electrostatic deposition of high transfer efficiency in top-coat application until 1984. EPA is also reviewing the recently-promulgated new source performance standard (NSPS) for auto body painting to consider the effects of increased use of clear coat.	EPA will discuss changes in SIPs with the States by May 1981, with timing of subsequent changes dependent on the States. EPA plans to complete its review of the NSPS for auto body painting by July 1981.	NA	300	
Forego Assembly Line Testing at High Altitudes	This decision became effective on April 6.	NA	0.175	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Statutory NOx Standard for all Light-Duty Diesels through the 1984 Model Years EPA initiated consolidated proceedings to waive the NOx standard from 1.0 to 1.5 gpm to the maximum extent permitted by law for light-duty diesels through the 1984 model year. Waiver of the standard to 1.5 gpm will give the industry more time to develop appropriate technology while allowing fuel-efficient diesel vehicles to be sold.	Notice informing industry of EPA's plans to accept waiver applications for 1982-1984 model year diesel passenger cars has been published.	NA	NA	
Statutory CO Standard for Certain Classes of 1982 Model Year Light-Duty Vehicles EPA initiated consolidated proceedings to waive the CO standard from 3.4 to 7.0 gpm to the maximum extent permitted by law for classes of 1982 model year light-duty vehicles not previously produced to meet the 3.4 gpm standard.	Notice was published in the Federal Register	NA	0	No firm estimates of savings are available, but as an example of the savings, one recent waiver saved $35 per vehicle for one manufacturer.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Non-methane hydrocarbon standards HC emissions are regulated because some hydrocarbon emissions interact with other pollutants in the atmosphere to cause smog. Industry has always contended that methane, a nonreactive hydrocarbon, should not be included when measuring the level of pollutants that may be emitted. Since the equipment exists to exclude measurement of methane and since there is no debate concerning the nonreactivity of methane, EPA will seek to adopt equivalent nonmethane hydrocarbon standards as an option for all vehicle classes.	Non-methane HC standards will be developed and a NPRM will be published by November 1, 1981.	NA	0	
Motor Vehicle Certification Program EPA intends to further streamline this program, giving manufacturers more responsibility for running their own certification programs. Most passenger cars are meeting the statutory standards and manufacturers have become familiar with the testing programs so that EPA does not have to be involved as much as before.	An interim-final rulemaking to streamline the certification program will be published by October 1, 1981, effective for the 1983 model year.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Test Vehicle Exemption Requirements				
EPA regulations permit manufacturers to apply for exemptions from the prohibition on the introduction into commerce of an uncertified vehicle. These exemptions are necessary as uncertified vehicles are frequently used in development and testing programs. The reporting requirements for these regulations were designed to assure EPA that these vehicles were only being used for testing purposes. EPA intends to relax both the reporting requirements and the requirements for qualifications for an exemption to reduce administrative burdens.	A NPRM will be published by May 30, 1981.	NA	NA	
Emission averaging scheme for manufacturers to meet the NOx emission requirement for light and heavy trucks				
EPA has been investigating the possibility of allowing manufacturers to meet the NOx standards for trucks "on the average" rather than requiring that each vehicle meet a specific NOx standard.	EPA has published a NPRM for NOx averaging (45 FR 79382) and intends to propose an averaging scheme by May 1982, in conjunction with the NOx rulemaking.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Intention to provide sufficient leadtime for compliance with emission regulations				
In setting various emission standards, EPA must take into account the time that the industry will need to either develop the necessary control technology or to make other changes in order to meet the standards. EPA intends to provide this necessary leadtime, as measured from the date of promulgation of regulations.	EPA's position will be made clear in future notices and appropriate contacts with the manufacturers.	NA	NA	

DEPARTMENT OF HEALTH AND HUMAN SERVICES

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Medicaid Regulation Affecting States At present a variety of regulations impose significant administrative requirements on States. States contend that these regulations hamper their ability to provide services to needy people at reasonable funding levels. (42 CFR 430-456)	On Task Force list of existing regulations to be reviewed.	NA	NA	Medicaid regulatory relief should accompany the Administration's medicaid cap. In addition, the President has promised States that regulatory relief will accompany his proposal to limit Federal Medicaid expenditures. For these reasons, a thorough review is warranted.
Health Care Institution Certifications and Surveys Hospitals, nursing homes, and other institutional health care providers are subject to myriad, frequent and duplicative surveys and reviews. Many of these reviews are a result of the Federal government's role in insuring the health and safety of patients. (42 CFR 405)	On Task Force list of existing regulations to be reviewed.	NA	NA	FY 1982 budget cuts have been proposed for inspections and certifications.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
New Drug Application Requirements				
This set of regulations governs the submission and review of new drug applications. It involves requirements for testing and marketing of all drugs to be used by consumers in the United States. (21 CFR 314)	On Task Force list of existing regulations to be reviewed.	NA	NA	Concern from the public, Congress and the drug industry about delays in the existing process and its cost justifies a thorough review.
Foster Care Funding				
Establishes requirements for receipt by State and local governments of funds for this program.	Approved withdrawal of interim final rule.	NA	NA	

TABLE 2 continued

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Uniform Relocation Assistance and Real Property Acquisition This rule contains the Department's policies governing the relocation of mobile home occupants displaced by a HUD-assisted project that is subject to the Uniform Relocation Assistance and Real Property Acquisitions Act of 1970. (45 FR 81740)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Property Improvement and Manufactured (Mobile) Home Loans This rule provides for increases in loan amounts for manufactured (mobile) home loans as authorized by Section 308 of the Housing and Urban Development Act of 1980. (46 FR 4872)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Rent Supplement Payments Interim rule implementing certain provisions of Section 203 of the Housing and Community Development Amendments of 1979. (45 FR 84046)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	

TABLE 4 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Mortgage and Loan Insurance Programs under the National Housing Act This rule deletes the requirements that the term of a supplementary financing loan insured under Section 216 of the National Housing Act may not exceed the remaining term of the insured mortgage. (46 FR 3842)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Loans for Housing for the Elderly or Handicapped (Interest rate determination) This rule implements the determination that the allowance for administrative costs and probable losses to be included in Section 202 direct loan interest rate charged to borrowers should be 1/4 of 1 percent per annum for both the construction loan and the permanent loan. (46 FR 3843)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Rehabilitation Loan Program This final rule governs the Administration of the Section 312 Rehabilitation Loan Program under the Housing Act of 1964. (45 FR 59802)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Rehabilitation Loan Program The regulations for Section 312 Rehabilitation Program are being amended to implement changes made in the program by the Housing and Community Development Act of 1980. (46 FR 3503)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Manufactured Home Procedural and Enforcement Regulations This rule revises manufactured housing procedural and enforcement rules to provide for the automatic disqualification of any inspection agency if such agency has been inactive for a period of one year. (45 FR 82854)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Neighborhood Self Help Development Program This rule revises the procedures for the award of grants and for training and information assistance under the Neighborhood Self-Help Development Program. (45 FR 81743)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Real Estate Settlement Procedures Act Section 8, Anti-Kickback Regulations, Interim Rule This rule clarifies certain terms used in connection with Section 8 of Anti-kickback Prohibitions. (45 FR 84048)	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	

TABLE 4 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Government National Mortgage Associations Attorneys-in-Fact Deregulations - List These individuals act on behalf of GNMA in executing various documents associated with the commitment to purchase and sale of mortgages under certain GNMA programs.	Notice of withdrawal published in the Federal Register. (46 FR 11550)	NA	NA	
Mortgage Insurance and Assistance Payments for Home Ownership and Project Rehabilitation, Interim Rule (26 CFR 235) The Housing and Community Development Act of 1980 amends the National Housing Act in order to permit an increase in the mortgage amounts under HUD's Section 235 mortgage insurance program. (45 FR 82667)	Withdrew prior to publication for reconsideration.	NA	NA	
HUD Use of Materials Bulletin No. 73a, Plastic Bathtubs, Shower Stalls, Receptors and Lavatories, Proposed Rule; This Use of Materials Bulletin No. 73a (UM-73a) is a revision of UM-73 previously issued for Plastic Bathtubs, Shower Stalls, Receptors and Lavatories. (26 CFR 200)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Definition of Family and Other Related Terms; Occupancy by Single Persons, Final Rule; (24 CFR 812) In accordance with the statutory amendments to Section 3(2)(D) of the United States Housing Act of 1937 made by Section 206(c)of the Housing and Community Development Amendments of 1978, HUD is amending the regulations limiting the number of units within the area under the jurisdiction of a Public Housing Agency (PHA) which may be occupied by single, non-elderly persons made eligible by 24 CFR Part 812. (45 FR 13780)	Withdrew prior to publication for reconsideration.	NA	NA	
Management and Disposition of HUD-Owned Multifamily Housing Projects, Final Rule; (24 CFR 290) This rule amends the present interim rule on the disposition program published January 27, 1977. The new interim rule represents significant changes in policy and procedure in the management and disposition of HUD-owned multifamily housing projects. (44 FR 56608)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 1 continued

RULE	- STATUS	ANNUAL (RECURRING) COST (million of dollars)	INVESTMENT (ONE-TIME) COST	COMMENTS
Low-Rent Housing Home-ownership Opportunities, Turnkey III Program, Final Rule; Submitted to the Federal Register for publication 1/16/81. This proposed rule would amend the Turnkey III Home Ownership Opportunities Program to give Public Housing Authority (PHA) greater flexibility in the marketing of Turnkey III units and to set forth standards and procedures applicable to home-buyers. Included in the proposed rule are provisions for operating subsidies and PHA purchase money financing. (43 FR 60830)	Withdrew prior to publication for reconsideration.	NA	NA	
Mortgagee Approval, Eligibility Requirements; Mortgagee Approval, Final Rule. (24 CFR 203) The Department is revising, simplifying and clarifying the requirements for mortgagee approval. There are a number of significant changes. These amendments would revise the present sequence of the mortgagee approval requirements for improved organization. These regulations will restate and update the language and provisions of the regulations to provide greater definition and more comprehensive guidance to the Department and the residential mortgage lenders in the application and administration of the mortgagee approval requirements. (45 FR 50240)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE I continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Nondiscrimination Based on Handicap in Federally Assisted Programs and Activities of the Department of HUD, Proposed Rule. This rule sets forth procedures to ensure nondiscrimination based on handicap in programs and activities that received financial assistance from HUD. (26 CFR 8)	Withdrew prior to publication for reconsideration.	NA	NA	
Low-Income Homeownership Demonstration Program, Proposed Rule: This rule would authorize a demonstration program to provide loans to families whose incomes are 60 to 90 percent of the income necessary to purchase an existing house in a given area, or approximately 60 to 90 percent of the median family income. (26 CFR 830)	Withdrew prior to publication for reconsideration.	NA	NA	
Proposed Use of Materials Bulletin No. 82, HUD Standard and Certification Program for Sealed Insulation Glass, Proposed Rule: This use of materials bulletin would establish a standard and certification program for the use of sealed insulating glass. (26 CFR 200)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECCURING) COST (million of dollars)	INVESTMENT (ONE-TIME) COST (million of dollars)	COMMENTS
Prohibition Against Discrimination. Proposed Rule: Subparts a-I. This rule would set forth HUD's view of the conduct made unlawful by the prohibition in Title VIII against discrimination in appraisal practices and indicate the matters HUD may investigate in connection with alleged discrimination in appraisal practices. (26 CFR 144)	Withdrew prior to publication for reconsideration.	NA	NA	
Affirmative Administration of Programs relating to HUD, Subparts A-F Proposed Rule: This rule would provide guidelines for executive agencies to determine which programs and activities relate to housing and urban development and to analyze their impact on promoting fair housing. The rule would describe actions that can be used to assure that such programs and activities are administered affirmatively to further fair housing. This rule could be issued pursuant to Executive Order 12259 and Title VIII of the Civil Rights Act of 1918. (26 CFR 125)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Solar Energy and Energy Conservation Bank, Interim Rule; This interim rule establishes programs of the Solar Energy and Energy Conservation Bank for financial assistance for the purchase and installation of solar energy systems in residential buildings and the purchase and installment of energy conservation improvements in existing residential and multifamily residential buildings. The bank will make payments to lending institutions, local governments and utilities, which will provide the financial assistance to purchasers, owners and tenants. (26 CFR 1800-1835)	Withdrew prior to publication for reconsideration.	NA	NA	
Land Registration and Purchaser's Revocation Rights, Sales Practices and Standards, Proposed Interpretative Rule; Clarifies policies implementing the Interstate Land Sales Full Disclosure Act. Changes exemptions-from-registration requirements, consumer remedies, and relationship between Federal and State governments and between land sales rules and anti-fraud provisions. (26 CFR 1710 and 1715)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 4 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Mortgagee Review Board, Final Rule; This rule would provide greater clarification of the grounds which may result in an administrative action by the Board against a HUD-FHA approved mortgage. This rule would also provide greater flexibility in the administrative actions available to the Board to ensure compliance with HUD regulations and procedures. (26 CFR 25)	Withdrew prior to publication for reconsideration.	NA	NA	
Debarments, Suspensions, Temporary Denials of Participation and Voluntary Exclusions, Final Rule This rule [illegible] (26 CFR 24)	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
General GNMA Seal, Final Rule This amendment of the regulations of the Government National Mortgage Association provides for the Association's formal adoption of a corporate seal in accordance with section 309(a) of the National Housing Act. (24 CFR 300)	Withdrew prior to publication for reconsideration.	NA	NA	
CDBG Performance Standards for Equal Opportunities and Related Revisions, Proposed Rule; This rule would more completely describe the responsibilities of CDBG recipients in providing equal opportunity for minorities and women to benefit from and participate in the Community Development Block Grant Program. The rule also more specifically describes recipient's responsibilities for increasing the housing opportunities of lower income persons and for affirmatively furthering fair housing.	Withdrew prior to publication for reconsideration.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Areawide Housing Opportunity Plans, Proposed Rule: This rule would clarify objectives of the Areawide Housing Opportunities Program and ensure that these plans, when approved by HUD, will serve as a useful guide for allocating housing assistance within the area covered by the plan. (26 CFR 572)	Withdrew prior to publication for reconsideration.	NA	NA	
Environmental Review Procedures for CDBG and UDAG, Final Rule: This rule is mainly technical in nature providing editorial revisions with respect to the environmental review policies governing the Community Development Block Grant, Urban Development Action Agrant, and other assistance programs under Title I of the Housing and Community Development Act of 1974.	Withdrew prior to publication for reconsideration.	NA	NA	
Minimum Property Standards for One- and Two-Family Dwellings and Multi-Family Dwellings These rules are composed of numerous design, construction and amenities criteria used as requirements for new residential construction under HUD mortgage insurance, public housing and rent subsidy programs.	On Task Force list of existing regulations to be reviewed.	NA	NA	For numerous objectives of the MPS, alternative government programs and private market forces may achieve the same purposes. Review of the MPS could identify the duplications and opportunities to delete superfluous requirements.

TABLE 2 continued

DEPARTMENT OF INTERIOR

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST	COMMENTS
Prime Farmlands This rule implements the Surface Mining Act, and replaces rules invalidated by the Courts in 1978 concerning the standard defining whether mined areas should be returned to prime farmland and the "grandfather" rule concerning land being mined before passage of the Act. (46 FR 7208).	On Task Force list of of rules designated for postponement. Effective date proposed to be postponed indefinitely.	NA	NA	
Prime Farmlands This amendment also implements the Surface Mining Act, dealing only with the grandfather clause and also implementing the Court's ruling. (46 FR 7894).	On Task Force list of rules designated for postponement. Effective date proposed to be postponed indefinitely.	NA	NA	
Extraction of Coal, Two Acres or Less These rules tighten the two acre exemption included in the Surface Mining Act. (46 FR 7902).	On Task Force list of rules designated for postponement. Effective date proposed to be postponed indefinitely.	0.7 (for first year) 2.5 (over a 20 year period).	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENT
Tribal Government Elections The rule extends to tribes in Oklahoma and Alaska existing rules governing tribal elections in other states. Also, rules governing process for petitioning for an election are rewritten. (46 FR 1668, 1674)	On Task force list of rules designated for postponement. Effective date postponed until 4/30/81.	NA	NA	
FLPMA Exchange Authority for Public Land This rule deals with procedures governing the Department's authority to exchange public lands for private lands. (46 FR 1634).	On Task Force list of rules designated for postponement. Effective date postponed until 4/15/81.	NA	NA	
Land Withdrawal Procedures Amendments The rule sets out, for the first time, a consistent management process for handling withdrawal applications. (46 FR 5794).	On Task Force list of rules designated for postponement. Effective date postponed until 4/15/81.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Leases, Permits, Easements Through Public Lands This rule set out revised rules for leases, of public lands. (46 FR 5773).	On Task Force list of rules designated for postponement. Effective date postponed until 4/15/81.	NA	NA	
Hawaiian Tree Snail This rule extends endangered species protection to the Hawaiian tree snail. (46 FR 3178).	On Task Force list of rules designated for postponement. Effective date postponed until 4/30/81.	NA	NA	
Gypsum Wild Buckwheat and Todsens Pennyroyal These rules extend endangered species protection to the Pennyroyal plant and to the wild Buckwheat plant. (46 FR 5730).	On Task Force list of rules designated for postponement. Effective date postponed until 4/30/81.	NA	NA	

TABLE I continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Glacier Bay National Monument; Protection of Humpback Whale This rule establishes limits on small vessels within Glacier Bay and prohibits commercial harvesting of the organisms upon which the humpback whale feeds. (46 FR 85761).	On Task Force list of rules designated for postponement. Effective date postponed until 4/30/81.	NA	NA	
Surface Mining Rules - These regulations implement the Surface Mining Act, which sets forth techniques that must be used for surface mining, particularly recontouring and reclaiming the land afterwards. The requirements for original contour and vegetation may preclude more useful or aesthetic treatment. These rules not only raise the cost of surface mining, but could render some areas uneconomical to mine at all.	On Task Force list of existing regulations to be reviewed.	NA	NA	1982 budget cut of about $10 million has been proposed for this program.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)[1]	INVESTMENT (ONE-TIME) COST (millions of dollars)[1]	COMMENTS
Federal Coal Management Program These regulations govern competitive lease sales for coal on Federal lands. They determine the rate at which coal will be made available (target-setting procedures), and withdraw some areas entirely from coal mining ("unsuitability" criteria). In the West, where Federal lands contain the major share of total coal reserves, excessively restrictive management can cause shortages, lessen competition, and raise coal prices.	On Task Force list of existing regulations to be reviewed.	NA	NA	

TABLE 2 continued

DEPARTMENT OF JUSTICE

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
The Effect of a Strike on the Admission and Continued Employment of Certain Nonimmigrants				
Clarifies under which conditions temporary alien workers cannot be used as strikebreakers. (46 FR 4856)	On Task Force list of rules designated for postponement.	NA	NA	Issuance will delay that part of the rule that deals with the role of manager/supervisor alien workers as strikebreakers until additional analysis is completed.
Leadership and Coordination of Nondiscrimination Laws				
Rules, implementing Executive Order 12250, to coordinate the implementation of Federal laws that prohibit discrimination on the basis of race, color, national origin, religion, sex or handicap in programs receiving Federal financial assistance.	On Task Force list of existing regulations to be reviewed.	NA	NA	
Standards for Inmate Grievance Procedures				
Promulgates standards for prison inmate grievance procedures and establishes methods of certifying such procedures. (46 FR 3843)	DOJ has postponed the portion of the regulation pertaining to the certification process pending further review.	NA	NA	

DEPARTMENT OF LABOR

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Walkaround Compensation (OSHA) The rule would have required employers to pay their employees for time spent accompanying OSHA compliance officers in their inspection of the work place. (46 FR 3582)	On Task Force list of rules designated for postponement. Notice of proposed withdrawal published in Federal Register (46 FR 18999)	5.3	0	
Payment of Membership Fees (ESA) This rule would prohibit employers from paying membership fees for their employees to private clubs unless it was clear that the club did not discriminate. (46 FR 3092)	On Task Force list of rules designated for postponement. Notice of proposed withdrawal published in Federal Register (46 FR 19006)	NA	0	
Certification Process and Adverse Effects Wage Rate (ETA) The rule would have changed the method of determining the adverse effect wage rate from a regional to national level method and rate. (46 FR 6508)	On Task Force list of rules designated for postponement. Notice of proposed withdrawal published in Federal Register (46 FR 18991)	[illegible]	0	In 46 FR 19110, DOL announced adverse effect wage rates for 1981. The methodology set forth in 20 CFR 655.207, not the one described in this rule was used to get the AEWR.
Occupational Exposure to Lead. (OSHA) The rule specifies the amount of lead that can be in the air before controls must be introduced. (46 FR 6134)	On Task Force list of rules designated for postponement. Notice of proposed withdrawal published in Federal Register. Postponed to April 30, 1981. (46 FR 10974) DOL is further postponing the effective date to July 1, 1981.	30.3	$303 in 1980 dollars (upper bound)	This action only affects 48 industries covered by a decision of the Court of Appeals for D.C. issued August 15, 1980. The Court's decision permitted the the standard to be fully effective in 10 industries as of August 15, 1980.

TABLE 1 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
FLSA: Salary Tests This regulation would have raised the salary test levels so that fewer workers would have been exempted from the overtime requirements of FLSA. (46 FR 3010)	On Task Force list of rules designated for postponement. Notice of proposed rule-making to indefinitely suspend the revised salary tests was published. (46 FR 18998)	53	0	
Service Contract Act (ESA) Review of the SCA regulation which require the payment of "prevailing wages" to service employees working for firms that have contracts with the federal government. (46 FR 4390)	On Task Force list of rules designated for postponement. Postponed until May 1, 1981. (46 FR 18973) DOL is further post-poning the effective date to July 1, 1981.	100-200 (CWPS esti-mates) Direct cost of full com-pliance estimated by ASPER to be 37.90	0	
Procedures for Pre-determination of Wage Rate under Davis-Bacon (ESA) This rule modified the 30% model rate defining the "prevailing wage." (46 FR 4306)	On Task Force list of rules designated for postponement. Postponed until May 1, 1981. (46 FR 18973) DOL is further post-poning the effective date to July 1, 1981.	NA	0	The Department is planning to thoroughly reexamine Davis-Bacon and Service Contract Act regulations.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST	COMMENTS
Rules of Practices for Administrative Proceedings Enforcing Labor Standards (ESA) This regulation is related to the Davis-Bacon Act and Service Contracts Act. (46 FR 4396)	Postponed to May 1, 1981. (46 FR 18973) DOL is further postponing the effective date to July 1, 1981.	NA	NA	
Occupational Exposure to Lead: New Trigger Levels for Medical Removal Protection. (OSHA) This is related to the deferral of the "basic" lead standard. (46 FR 6134)	Postponed until May 1, 1981. (46 FR 18974) DOL is further postponing the effective date to July 1, 1981.	NA	NA	OSHA's F.R. notice asks for comments on a 1 year deferral.
Withdrawal of the Indiana State Plan (OSHA) This would have removed Federal approval of the State plan and eliminated State OSHA operations. 46 FR 19000	Withdrawn. (46 FR 19000)	NA	NA	
Cotton Dust (OSHA) On June 19, 1981 OSHA issued a final occupational health standard regulating exposure to cotton dust. The standards provides for a comprehensive regulatory program including a permissable exposure limit for airborne concentrations of cotton dust to be met through engineering controls, supplementary use of respirators, implementation of specified work practices, and a training program for employees. (43 FR 27350)	Advance notice of proposed rulemaking (46 FR 19501) announced that OSHA will be shortly undertaking a reevaluation of this regulation.	246.1	783.9	The final regulation (43 FR 27350) has been stayed pending a decision by the Supreme Court (case has been argued.) The Department has asked the Court not to issue a decision because of the Secretary's decision to reopen the rulemaking record.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Government Contractors Affirmative Action Requirements (ESA) These specify what actions and reporting and recordkeeping requirements government contractors must comply with in order to do business with the Federal government. (46 FR 9084)	On Task Force list of rules designated for postponement. Postponed until April 29, 1981. (46 FR 9084) DOL is further postponing the effective date to July 1, 1981.	NA	NA	
Labor Standards Provisions: Construction Contracts (ESA) This regulation is related to the Davis-Bacon regulations but is issued under the Contract Work Hours and Safety Standards. (46 FR 4380)	On Task Force list of rules designated for postponement. Postponed to May 1, 1981. (46 FR 18973) DOL is further postponing the effective date to July 1, 1981.	NA	NA	
Occupational Noise, Hearing Conservation Amendment (OSHA) (46 FR 4078) On January 16, 1981, the Occupational Safety and Health Administration published regulations effective April 15, 1981 that require employers to institute hearing conservation measures for all workers in general industry (except agriculture and construction) exposed to noise levels equal to or exceeding an eight-hour time weighted average of 85 decibels.	On Task Force list of existing regulations to be reviewed. Being postponed to June 1, 1981. (46 FR 21365)	250	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Carcinogen Policy (OSHA) The Cancer Policy explains how OSHA will regulate carcinogens in the future. It establishes (1) the evidentiary criteria by which OSHA will conclude that a substance causes cancer; (2) a system for establishing priorities; (3) rulemaking procedures, including limitations on the issues which can be raised; and (4) certain substantive requirements which must be incorporated into future regulations of Category I carcinogens. (45 FR 5002)	On Task Force list of existing regulations to be reviewed. DOL also withdrew proposed amendments to the cancer policy issued in 46 FR 11253. (46 FR 19000)	NA	NA	
Personnel Protective Devices OSHA has not published a comprehensive policy on personal protective devices. In most instances OSHA has required engineering controls instead of personal protective devices although personal protective devices might be more cost effective and ultimately more beneficial to workers and society	On Task Force list of existing regulations to be reviewed.	NA	NA	OSHA is undertaking a full-scale review of its general policy to require engineering changes to reduce or eliminate health hazards instead of allowing the use of personal protective devices. This is a generic issue which is being substantively examined in specified situations, such as Cotton Dust, in conjunction with an examination of the appropriateness of weighing both costs and benefits of safety and health standards.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
Prevailing Wage. Under the Davis-Bacon and Service Contract Acts, the Department of Labor establishes minimum rates, based on prevailing wage concept, for wages and benefits paid to workers by Government construction and service contractors.	On Task Force list of existing regulations to be reviewed.	228-513	0	GAO estimate of costs in 1977 dollars.
Office of Federal Contract Compliance Policy The Federal Contract Compliance programs are administered under the authority of a 1965 Executive Order (11246) and subsequent legislation.	On Task Force list of existing regulations to be reviewed.	NA	NA	These regulations need to be examined to determine if they exceed legal requirements.

TABLE 2 continued

OFFICE OF MANAGEMENT AND BUDGET

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Urban/Community Impact Analyses This OMB circular (A-116) requires agencies to conduct analyses to identify the likely effects of proposed major programs and policy initiatives on cities, counties and other communities.	On Task Force list of existing regulations to be reviewed.	NA	NA	
University Research Circular 73-7 establishes certain requirements for administration of college and university research programs. These include restrictions on how research projects are managed, and limitations on certain kinds of costs. They also call for numerous approvals by the Federal Government.	On Task Force list of existing regulations to be reviewed.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Cost Sharing on University Research Circular 73-3 provides guidelines to Federal agencies requiring universities to share in the cost of research projects, whether or not cost sharing is required by law.	On Task Force list of existing regulations to be reviewed.	NA	NA	

TABLE 2 continued

DEPARTMENT OF TRANSPORTATION

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
FHWA/Urban Transportation Planning (FHWA/UMTA) This rule implements the urban transportation planning process mandated by the Federal-Aid Highway Act and the Urban Mass Transportation Act of 1964. (46 FR 5702)	On Task Force list of rules designated for postponement. DOT withdrew and reissued an amended regulation to reduce red tape, streamline process, and update existing joint FHWA/UMTA regulations.	NA	NA	Requirements for conducting analysis of major urban transportation investments were withdrawn. Provisions to reduce red tape, provide streamlining, and update existing joint FHWA/UMTA regulations to reflect legislative changes were reconsidered.
Addition of Water to Pipelines Transporting Anhydrous Ammonia (RSPA) Establishes a water standard for pipelines transporting anhydrous ammonia. (46 FR 39)	On Task Force list of rules designated for postponement. Postponed for 60 days for review.	NA	NA	Further postponed to permit additional analysis of costs and benefits.
Traffic Control Devices (FHWA) Reduces and consolidates existing regulations that prescribe procedures for States to develop uniform traffic control devices. (46 FR 2539)	On Task Force list of rules designated for postponement. Notice of withdrawal published in the Federal Register.	NA	NA	Withdrew to reevaluate the program. FHWA could provide more flexibility to the States in implementing uniform traffic control device standards.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Carpool and Vanpool Projects (FHWA) Revises eligibility criteria for Federal funding of carpool and vanpool projects in accordance with the Surface Transportation Assistance Act of 1978. (46 FR 2038)	On Task Force list of rules designated for postponement. Notice of withdrawal published in the Federal Register.	NA	NA	Withdrawn to review policy of Federal government investing in private mass transit projects (carpools and vanpools). Economic impacts of reduced gas tax revenue would be offset by increased savings in highway maintenance.
Bus Rehabilitation Program Policy and Procedures (UMTA) Establishes policy and eligibility criteria for grants to aid in bus rehabilitation projects. (46 FR 9682)	On Task Force list of rules designated for postponement. Withdrawn and reissued as an UMTA circular in the Federal Register.	NA	NA	Withdrawn to develop more flexibility to transit system operators through an UMTA circular in the Federal Register rather than through a Federal regulation.
Emergency Stockpiling of Buses (UMTA) Allows grantees to stockpile buses for future emergency use. (46 FR 5[illegible])	On Task Force list of rules designated for postponement. Withdrawn and reissued as an UMTA circular in the Federal Register.	NA	NA	Withdrawn to develop more flexibility for UMTA grantees.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Minority Business Enterprise (Financial Assistance Program (OST) This rule requires DOT financial assistance recipients to establish affirmative action plans to increase the use of minority and women owned businesses. (49 CFR 23)	Existing regulation being reviewed.	NA	NA	
Nondiscrimination on the basis of Handicap This requires all DOT-assisted programs to become accessible to handicapped persons. (49 CFR 27)	On Task Force list of existing regulations to be reviewed.	139	2,600	Many of the rule's mass transit provisions are required by administrative guidelines now under the jurisdiction of the Department of Justice (DOJ). In order for DOT to change its regulation, joint review and action by DOT and DOJ would be needed.
Vessel Reporting Requirements (USCG) These regulations require vessel owners to report their locations, arrivals and departures when carrying certain hazardous cargoes. (33 CFR 161)	Existing regulation is being reviewed.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Navigation Safety Regulations (USCG) These regulations implement regulations requiring that commercial tank vessels carry dual radar systems and redundant (back-up) steering systems. (33 CFR 164)	Existing regulation is being reviewed.	NA	0.05	
Puget Sound Vessel Traffic Service Rule (USCG) This interim rule prohibits oil tankers weighing more than 125,000 dead weight tons (DWT) from entering Puget Sound. This interim rule took effect in 1978. The purpose of the regulation was to protect against environmental harm from oil or polluting material spills that result from vessel damage, destruction and loss. (33 CFR 161)	Existing regulation is being reviewed.	NA	NA	Tests are being conducted by the Coast Guard, in the area to determine the risks of tanker spillage.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Marine Sanitation Devices on Vessels (USCG) These regulations govern the design and construction of marine sanitation devices in accordance with the regulations and performance standards promulgated by the Environmental Protection Agency (EPA) under section 312 of the Federal Water Pollution Control Act. They also contain the procedures by which Coast Guard enforces its own and EPA standards pertaining to these devices. The purpose of the regulations is to eliminate the discharge of untreated sewage from vessels into the waters of the United States. (33 CFR 159)	Existing regulation is being reviewed.	100	1,000	Any revision of the regulation will require coordination with EPA.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Documentation and Measurement of Vessels (USCG) These regulations implement several old vessel documentation laws. Those laws stipulate that commercial vessel owners must obtain documentation on their vessels from the Coast Guard. (46 CFR Subchapter G)	Existing regulation is being reviewed.	NA	NA	The implementing regulations are considered burdensome because they contain extremely heavy paperwork requirements. Until now, the annual public cost of documentation has been 750,000 person hours of paperwork. However, the 96th Congress enacted legislation (P.L. 96-594) that will allow the Coast Guard to prescribe simplified documentation procedures that would eliminate a large portion of the paperwork requirements. This law will be effective on July 1, 1982.
Pollution Prevention Regulations. (USCG) The regulations require segregated ballast tanks, clean ballast tanks, and crude oil washing systems in various combinations for oil tankers. The purpose of the regulations is to prevent pollution. PTSA also requires a regulation to be promulgated by January 1, 1986, that would require retrofitting of United States flag vessels of between 20-40,000 tons that are 15 years old or older with these pollution prevention systems. (33 CFR 157)	Existing regulation is being reviewed.	NA	5,000-6,000	PTSA is fairly specific in requiring certain pollution prevention systems and legislative canges may be needed.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Production and Quality Control System Rules (FAA) Under these rules holders of production certificates must adhere to stringent quality control standards, including establishing a quality control organization and, sometimes, testing each item produced. (14 CFR 21)	Existing regulation is being reviewed.	NA	NA	The rules involve considerable paperwork burdens. They are controversial because manufacturers other than the original manufacturer can produce replacements parts for aeronautical products by complying with less stringent standards than imposed on the original manufacturer. Some argue that the rules are anticompetitive in nature.
Deregulation of Sport Aviation (FAA) Requires that sports aircraft meet the same airworthiness standards factory built aircraft and be maintained to the same standards. (14 CFR Parts 21 and 91)	Existing regulation is being reviewed.	NA	NA	Operation and construction of sport aircraft under the present rules is costly and controversial.
Normal, Utility, and Acrobatic Category Airworthiness Rules (FAA) The rules apply the same certification standards over a broad spectrum of airplanes, from the most rudimentary to very sophisticated and complex multi-engine airplanes. (14 CFR Part 23)	Existing regulation is being reviewed.	NA	NA	These rules are costly and controversial because of the expense of administration and certification of small, simple airplanes.

TABLE 4 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Repair Station Rules (14 CFR Part 145)	Existing regulation is being reviewed.	NA	NA	
Rotocraft Certification and Operating Rules These rules deal with the operating characteristics of rotocraft. (14 CFR Parts 27, 29, 91 and 127).	Existing regulation is being reviewed.	NA	NA	
General Operating and Flight Rules These rules impose equipment and operational requirements (14 CFR Part 91). (FAA)	Existing regulation is being reviewed.	NA	NA	
Pilot Certification, Ground Instructor, and Pilot School Rules Requirements are specified for the certification of pilots, pilot schools and ground instructors. (14 CFR Parts 61 and 141) (FAA)	Existing regulation is being reviewed.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Air Carrier Certification Operating and Maintenance These rules impose requirements on flight crewmember flight and duty time, flight dispatch and flight control systems, and maintenance reporting requirements.	Existing regulation is being reviewed.	NA	NA	
Air Quality Guidelines/ Environmental Impact Procedures These rules set forth procedures that implement, respectively, a DOT-EPA interagency agreement pursuant to the Clean Air Act amendments of 1977 and the 1978 Council on Environmental Quality (CEQ) regulations. (23 CFR 770, 771).	Existing regulation is being reviewed.	NA	NA	
Hours of Service (FHWA) This regulation limits the number of hours interstate truck and bus drivers can drive and be on duty in a given day or week. (49 CFR 359)	Existing regulation is being reviewed.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Commercial Vehicle Inspection, Repair, and Maintenance (FHWA) This regulation requires regular inspections of commercial vehicles for mechanical and other defects and calls for the preparation of various reports.	Existing regulation is being reviewed.	NA	NA	
Buy America Regulations (UMTA) This regulation implements the requirements of the Surface Transportation Assistance Act of 1978 that requires that preference be given to items produced in the United States in UMTA funded projects. (49 CFR 600)	Existing regulation is being reviewed.	NA	NA	
Power Brake Rules (FRA) The present rules prescribe a series of operational air brake inspections and tests as well as a series of single car inspection, testing and repair requirements that are performed in shops on repair tracks. (49 FR 232)	Existing regulation is to be reviewed.	100	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Regulations on Hours of Service of Railroad Employees (FRA) The Hours of Service Act prescribes the maximum hours that certain railroad employees, such as train crew members, train dispatchers, tower operators and signal maintainers, may remain on duty within any 24-hour period. The Act sets out employee working conditions and defines "time on duty" and "designated terminals." (49 CFR 228)	Existing regulation is being reviewed.	NA	NA	
Movement of Defective Cars (FRA) The Safety Appliance Act (49 USC 13) imposes unduly severe statutory restrictions on the movement of individual cars with defective safety appliances (e.g., handholds, ladders, sill steps, uncoupling levers) and defective brakes.	Existing regulation is being reviewed.	25	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Line Markers for Mains and Transmissions Lines (RSPA) These regulations require markers to be placed at each crossing of a navigable waterway by a pipeline. (49 CFR 192.707(a))	Existing regulation is being reviewed.	NA	100	
Repair and Removal of Defects (RSPA) These rules, which specify what repairs are permitted on defective pipe welds, may be more restrictive than required for safety. (49 CFR 192.245 and 195.232).	Existing regulation is being reviewed.	20	NA	Changing the rules to allow some repairs of defective welds rather than total removal, could save industry about 60 million per year.
Data Collection and Reporting Welds and Leaks (RSPA) 49 CFR 195.234(g) and 191. Recordkeeping for the safety enforcement program.	Existing regulation is being reviewed.	6	NA	
Regulation of Paint (RSPA) These regulations are applicable to small quantity paint containers. (49 CFR 173.128)	Existing regulation is being reviewed.	1	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (million of dollars)	INVESTMENT (ONE-TIME) COST (million of dollars)	COMMENTS
Civil Rights Requirements (FHWA) These regulations carry out program and employment nondiscrimination requirements under Title VI of the Civil Rights Act of 1964, Executive Order 11246, and other authorities. (23 CFR 200, 230)	Existing Regulation is being reviewed.	NA	NA	
Design Standards for Highways (FHWA) This rule, by incorporating by reference a number of other FHWA rules and industry consensus standards, prescribes the technical requirements for highway construction. (23 CFR 625)	Existing regulation is being reviewed.	NA	NA	Some states have complained that these standards are too rigid, and would prefer to set their own design standards. FHWA has proposed to take an approach of this kind for standards for the rehabilitation, restoration and resurfacing of highways other than freeways. The review is needed to establish whether a more flexible approach is appropriate for new construction as well.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Guidelines for the Development of Environmental Action Plans This regulation requires FHWA recipients to write "action plans" describing how they will take environmental impacts into account and meet the other administrative requirements in the environmental area. (23 CFR 795)	Existing regulation is being reviewed.	NA	NA	
Urban Initiatives Program (UMTA) This regulation concerns funding for mass transportation projects to enhance urban development. (46 FR 5820)	On Task Force list of rules designated for postponement.	NA	NA	Withdrawn as unnecessary since grant competition is scheduled to end.
Cost Sharing on University Research Circular 73-3 provides guidelines to Federal agencies requiring universities to share in the cost of research projects, whether or not cost sharing is required by law.	On Task Force list of existing regulations to be reviewed.	NA	NA	

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Delay Implementation of Passive Restraint Standard.				
The standard requires that manufacturers install automatic occupant restraints in passenger car front seats according to the following schedule: large cars in model year 1982, intermediates and compacts in 1983, and small cars in 1984. (49 CFR 571.108)	NHTSA announced a one year delay in the implementation of the standard on April 6, 1981.	105 (one-time consumer cost saving)	30	
Amend Passive Restraint Standard				
Same as above.	NHTSA has proposed for comment several alternatives to further amend this standard. (46 FR 21205, April 9, 1981)	NA	NA	Additional savings of as much as $600 million in investments and $1 billion annually in consumer costs are possible, depending on action taken by the department.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Bumper Standard				
The Motor Vehicle Information and Savings Act requires a bumper standard which achieves "the maximum feasible reduction of costs to the public and to the consumer" in low speed collisions. The standard now requires uniform bumper heights and protection from damage at speeds up to 5 mph for front and rear bumper systems. (49 CFR 581)	NPRM proposing changes to the standard will be published in April.	650	NA	Some capital costs are required to modify the standard.
"Fields of Direct View" Requirements for Passenger Cars (49 CFR 571.128)				
Rule deals with design requirements for driver vision and sets performance requirements for: (1) the maximum permissible size of obstructions in the driver's field of view; (2) a minimum field of view through the windshield, and (3) light transmittance through the windshield stand as installed.	NHTSA will initiate rulemaking on or about July 1, 1981, to rescind FMVSS No. 128.	NA	174	Capital investment estimates are by GM and Ford.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Rulemaking on "Field of Direct View" for trucks, buses, and multipurpose passenger vehicles				
An NPRM published in 1978 proposes to limit the size of obstructions in the driver's line of sight and specifyig unobstructed critical viewing area for trucks, buses and MPVs.	NHTSA will issue a notice in the Federal Register informing industry that the 1978 NPRM is rescinded, on or before June 1, 1981.	NA	NA	Formally terminating rulemaking will eliminate uncertainty and potential redesign and compliance testing costs.
Post-1985 Fuel Economy Standards				
The Motor Vehicle Information and Cost Savings Act authorized NHTSA to set post-1985 fuel economy standards. On January 26, 1981 NHTSA initiated a rulemaking on such standards.	Notice to withdraw the ANPRM will be published on or before June 1, 1981.	NA	NA	Withdrawal of the ANPRM will resolve uncertainties, and reduce the current burdens on industry to respond to very detailed inquiries for information.
Uniform Tire Quality Grading System				
NHTSA's current regulation requires that tires be tested and graded by manufacturers for treadwear, traction and heat resistance.	NHTSA will publish on or before June 1, 1981 an ANPRM seeking data and public comment on a substantial revision of this regulation.	NA	NA	Simplification of the UTQGS would enhance availability of consumer information.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Safety Belt Comfort and Convenience				
This rule specifies such things as shoulder belt tension, accessibility of buckles and convenience hooks in an effort to encourage seat belt use by making them more comfortable. (49 CFR 571.208)	NHTSA will propose substantive changes and defer effective date for one year.	4	NA	Industry estimates that costs could be several dollars per vehicle with multi-million dollar tooling costs.
Safety Problems Associated with the use of Multipiece Tire Rims				
In March 1979, NHTSA issued an ANPRM regarding performance levels for multipiece tire rims to prevent explosive separations.	NHTSA will issue a notice on or before July 1, 1981 indicating that rulemaking will be terminated in this area.	75	300	Since the issuance of the ANPRM, introduction of the problematic multipiece rims has virtually ceased. Occupational hazards in service facilities for commercial tires have become controlled by regulations of OSHA.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Standard on Speedometers and Odometers				
This standard was published on June 6, 1980. It requires that speedometers should be calibrated in mph and km/h and odometers be tamper-resistent.	NPRM to rescind standard to be published by July 1, 1981.	11	NA	The major objection to this standard was the absence of safety benefits.
Theft Protection Standard				
This standard was issued on December 22, 1980. It extends to light trucks and vans the anti-theft and key locking steering column requirements previously applicable only to passenger cars. In addition, it requires that all ignition locking systems be redesigned so that the key cannot be removed while the vehicle is in motion.	NHTSA will respond to petitions for reconsideration by June 1, 1981; will propose a one year deferral of the effective date and deletion of the key removal provisions.	10	NA	
Hydraulic Brake Performance Standard for Light Trucks, Buses				
Rule would require upgrading the braking performance of about 20 percent of new light trucks, buses and vans.	Notice of decision on pending petitions for reconsideration and necessary proposed rulemaking will be published by June 2, 1981.	18	NA	Current industry practices may achieve results that are virtually equivalent to those that would be achieved by the proposed rule.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST	INVESTMENT (ONE-TIME) COST	COMMENTS
		(millions of dollars)		
Rulemaking on Low Tire Pressure Warning Indicators				
On January 26, 1981 NHTSA issued an ANPRM to initiate rulemaking to require that all passenger cars, trucks and buses be equipped with a low tire pressure warning device.	Notice will be published by June 1, 1981 that rulemaking has been terminated. Contract research will continue.	130	NA	
Requirements on Tire Reserve Load				
Under NHTSA regulation published in July 1980, manufacturers are required to identify to consumers/purchasers the "tire reserve load" capacity, and submit this and other consumer information to NHTSA 90 days before model introduction.	A proposal will be published in April 1981 to eliminate information requirements on Tire Reserve Load and reducing the minimum advance notice required before tire production may start.	NA	NA	Costs of this regulation include loss of flexibility and expenses for reporting, testing and recordkeeping requirements.
Rulemaking on Design, Testing, and Labeling of Batteries				
Since January 1977, NHTSA has been considering rulemaking to establish a standard and prescribe test procedures applicable to new and replacement batteries. Maintenance-free batteries have lessened the need for regulation in this area.	Notice to be published by July 1, 1981 that rulemaking on batteries is being terminated.	NA	NA	Cost include expenses for design and compliance testing, costs associated with printing and affixing manuals and labels, and expenses for investment in testing equipment.

TABLE 2 continued

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Streamline and Reduce Fuel Economy Reporting Requirements				
NHTSA regulations now require semi-annual reporting of complicated data on manufacturers' progress in meeting fuel economy standards.	Proposal to be published by June 1, 1981 to streamline and reduce requirements.	na	na	Costs include significant paperwork and reporting burdens.
Federal Requirements Applicable to Vehicle Identification Number				
FMVSS 115 requires that each motor vehicle have affixed to it a 17-digit vehicle identification number which must be unique and which consists of combinations of characters which identify the manufacturer, make, type, size, place of manufacture and individual sequential number of manufacture.	Proposal to be published by June 1, 1981.	na	na	Minimal costs marginally but significant potential costs in event of a recall.

TABLE I continued

DEPARTMENT OF THE TREASURY

RULE	STATUS	ANNUAL (RECURRING) COST (millions of dollars)	INVESTMENT (ONE-TIME) COST (millions of dollars)	COMMENTS
Revenue Sharing Handicapped Discrimination Regulations				
Implements Section 504 of the Rehabilitation Act of 1973. The rule will impose new obligations on local governments receiving revenue sharing funds, to prevent discrimination against the handicapped in services, employment and access to facilities. (46 FR 1120)	On Task Force list of rules designated for postponement. The effective date of the final rule has been deferred until May 30, 1981; Treasury has requested comments on whether to defer the regulations indefinitely or allow them to have interim effect during the period of reconsideration. (46 FR 29468)	NA	NA	
Use of Published Indices to Determine Inventory. (IRS)				
Proposed amendments to the LIFO regulations that would permit taxpayers to use price indexes prepared by the Bureau of Labor Statistics in lieu of computing an inventory price index based on their own inflation experience. (46 FR 3912)	On Task Force list of existing regulations to be reviewed.	NA	NA	Current LIFO rules are perceived by small businesses to be too complex and burdensome. Technical issues need to be addressed through further rulemaking.

Highly volatile grain dust cause of many explosions

By TERRY McWILLIAMS
Journal Reporter

The explosions that ripped through a grain elevator Wednesday, destroying ConAgra Inc.'s animal feed plant near downtown Knoxville isn't an isolated incident among the nation's grain storage facilities.

Since 1980, more than 100 explosions at grain elevators have killed 40 workers.

And they continue to occur because of several reasons, officials say:

- Experts don't know exactly why explosions occur.
- Barring major expenditures, the blasts are difficult to prevent.
- Few formal national or state safety standards exist, so government inspectors aren't able to flag possible safety hazards.

ConAgra Inc., at its 78-year-old Knoxville plant, manufactured Formax brand feed for livestock, poultry, horses, dogs and rabbits. Administrative offices for a subsidiary of the $5.5 billion company, AgriBasics Co., were located within the complex.

The Wednesday explosions marked the plant's second major incident within six years, when a compressor blew up inside a storage warehouse and sparked a two-alarm fire.

Federal officials said Wednesday's toll of one death, two missing and 11 injured ranked the blast as the worst grain-related disaster since April 1981, when nine died and 30 were hurt in an explosion at the Corpus Christi (Texas) Public Elevator Co.

The problem that haunts grain storage and milling facilities is grain dust, a highly volatile, microscopic mixture.

"Grain dust is very lethal, very explosive," says Dr. Gene DeBusk, a University of Tennessee agricultural engineer. "It contains a tremendous amount of energy. If it collects in the right mixture, all it needs is a spark to blow it off."

Mike Barrett, a health and compliance inspector for the Tennessee Department of Labor, described the danger this way:

"You can take a Bic lighter to a piece of steel, and it will never burn. But take a steel wool pad, separate it, and light it with a Bic lighter, and it will burn real quick. Anything can burn at the right concentration.

"Grain dust is not considered to be flammable, but anything is explosive in those terms. A lot of people think if it's not gasoline, then it won't burn. They're wrong," Barrett said.

Experts say the concentration of grain dust is the key to the fires. Like gasoline in an automobile engine, a spark won't cause an explosion if the mixture is too lean or too rich.

Given the right mixture, most explosions inside grain elevators and storage facilities are caused by sparks from electrical shorts, mechanical failures and overheated bearings inside the elevator shaft. Welders have caused explosions, and, at times, grain explodes by itself, spontaneously, said Ralph Regan, a U.S. Agriculture Department official with the Federal Grain Inspection Service.

Regan, who noted the USDA became concerned about the problem as early as 1912, said as little as 1/100 of an inch of dust that accumulated inside a test storage facility has caused explosions. Normally, 1/64 of an inch — or the amount of dust that collects on a desk after a week of inactivity — would provide fuel for a blast.

He said the grain industry, the National Academy of Sciences and major universities in Kansas and Michigan have joined with a U.S. task force to study the problem. More than $3 million has been spent

Recent explosions of grain dust

year	explosions	injuries	deaths
1980	45	30	18
1981	21	62	13
1982	14	25	13
1983	13	14	0
1984*	12	18	3

* Through August.

Source: USDA Federal Grain Inspection Service.

researching the problem that may affect any of the nation's 15,000 storage facilities, he said.

To prevent grain dust explosions, DeBusk said, authorities recommend vigorous ventilation and basic housekeeping procedures to prevent a dust buildup.

Expensive dust removal systems exist, federal officials say, but would cost industry millions of dollars to install.

James G. Johnston, the Knoxville plant's superintendent from 1930 to 1976, when the facility was owned by Security Mills Inc., said steam was blown inside the grain storage area as a precaution.

"Ever since I've known of feed mills, I've known they were dangerous. You can keep one clean as a pin, and I understand they can still blow," he said.

"We've just been lucky (during Johnston's tenure). This is not unusual."

To compound the grain dust problem, state and federal governments do not perform regular inspections specifically targeting grain dust accumulation or dust concentrations in the air.

The federal government only inspects the 60 U.S. grain facilities where USDA employees work, Regan said.

"We have a legal responsibility to protect our employees," Regan said.

Regan said the grain industry, as a whole, shows an accident and death rate lower than many other businesses. He said the industry problem only gains attention when an explosion takes place.

The state doesn't perform any special inspections to curb grain dust explosions, even though the grain industry ranks 261st of 289 industries on the federal "high-hazard list."

"We do not have any regulations to direct us to inspect for this type of thing," said Mark McBride, a spokesman for the Tennessee Occupational Health and Safety Administration (TOSHA).

ConAgra Inc.'s Knoxville plant was inspected twice within the last four years, according to regular TOSHA safety and health guidelines. In March 1983, the state found no violations. In June 1981, inspectors found five "non-serious" violations which were immediately corrected, State Labor Department spokesman Vicki Keeton said.

She said inspectors sample the air for grain dust, but only for the worker's respiratory health. She said they do look for equipment that could possibly cause sparks.

If formal complaints are lodged against a company, the state immediately conducts an inspection. But since 1981, Keeton said, the Labor Department has received no formal complaints against ConAgra Inc.

But Wednesday's explosion and fire will be fully investigated through employee interviews and an on-site inspection to determine if TOSHA standards were violated. She said fines and penalties could be assessed if a violation is found. The amount depends upon its seriousness, she said.

Federal officials took notice of the grain dust problem in December 1977, when two grain elevators exploded within 5 days in West Wego, La., and Galveston, Texas, killing 54 people and injuring 30. OSHA issued guidelines urging industry to take extra housekeeping measures, limit static electricity and train employees on precautions.

In a 1983 labor publication, AFL-CIO President Lane Kirkland blamed the Reagan Administration for trying to abolish a strict dust accumulation standard developed by experts on the U.S. task force. The U.S. Office of Management and Budget was concerned about the new rule's financial impact on "country" grain elevator operators.

Doug Gamble, president of the Tennessee Committee on Occupational Safety and Health, also criticized the Reagan Administration for failing to impose tougher standards.

"The danger (of such plants) has been documented for four years," Gamble said in reaction to Wednesday's explosion. "The danger is clear. It's not like it's been any secret. It's a powder keg."

ConAgra explosions leave 1 worker dead, 2 missing

By TIM SMITH
Journal Reporter

Explosions in a grain storage area at ConAgra Inc. Wednesday morning leveled the feed plant, leaving one worker dead, two missing and at least 11 people injured.

More than 20 fire and rescue vehicles and almost 100 emergency personnel answered the three-alarm fire at the Van Street plant that started shortly after two explosions were reported at 11:39 a.m., according to Knoxville Fire Chief Bruce Cureton.

The fire, the third at the plant since 1950, was contained about 1:30 p.m., fire officials said, but was expected to burn into the night.

The dead worker was identified as Harvey Chamberlain, 48, of Mascot. Chamberlain, a forklift operator, was the father of eight children and had six grandchildren. He also is survived by his wife, Juanita Canada Chamberlain.

"They're all pretty shaken," said Terry Lyles, who is married to one of Chamberlain's daughters. "That's one of the closest families you'll ever see. They'll support each other."

The heat of the fire was so intense that it was nearly three hours after the explosion before officials could recover Chamberlain's body. The body, found near the loading dock, had been visible for some time, Assistant Fire Chief Luther Bradley said.

"We had a couple of men when they first arrived at the scene try to get him," Bradley said. "They could see him, but they couldn't get to him."

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"We had a couple of men when they first arrived at the scene try to get him," Bradley said. "They could see him, but they couldn't get to him."

Two others were believed to be inside the building. But Cureton said it would be hours before rescue personnel could begin digging through the building.

Carolyn Henderson, the wife of another missing worker, 47-year-old Ed Henderson, stood crying with one of her sons while she waited for some news.

Henderson and Charles "Gene" Ferguson, 63, were the only two men still missing from the morning shift.

George McKeehan, one of an estimated 35 workers at the plant site at the time, said he survived by diving for cover when he heard the first explosion.

"The first thing I saw was a river of fire that swept by me like a flamethrower," the 58-year-old worker said. "I thought it caught my clothes on fire and I dived under the electronic turntable. I didn't think I was going to get out from under it. Rocks were falling all over."

Officials said the cause of the blaze is not known. But workers said they were all aware of the possibility of a blast.

"It's like working in a coal mine," McKeehan said. "You always know it can happen. If the atmosphere gets just right, it's hard to prevent."

Witnesses said the fire started with an explosion that blew the top of the grain elevator 30 to 40 feet in the air.

"I saw the top of the building go 30 feet in the air," said David Craig, who was on a ladder painting a business across the street from ConAgra. "Bricks went everywhere and then the fire started. It made my ladder bounce off the wall three times."

"It was just like somebody dropped a bomb inside the e," said Charles Edwardterry, a resident of the neighborhood on the east side of the plant. "The fire went up the top of the elevator shaft and spread everywhere."

Flames and black smoke reached hundreds of feet into the air, showering adjacent areas with soot.

The Knoxville Fire Department used both of its aerial platform units on the fire, in addition to 11 fire engines, two ladder trucks and two medical vehicles.

City officials said the recent firehall closings had no apparent effect on the capability of the force which fought the fire Wednesday.

Although the fire initially threatened a set of nearby Knoxville Utilities Board gas tanks, in addition to a 6,000 pound propane tank on the north side of the plant, no evacuations were ordered.

But businesses in the area closed anyway and the burning debris which fell on adjacent railroad tracks closed Southern Railway traffic.

While firefighters poured thousands of gallons of water on collapsing brick walls, three area hospitals prepared for as many as 150 casualties, the first reported number of employees working at the plant.

Ironically, the University Hospital Lifestar helicopter, the hospital's air ambulance, was down for maintainence and its director was out of town.

The plant, built in 1906, was the site of a fire in the early 1950s which caused about $13,000 in damage. Another fire occurred in June 1978, causing about $50,000 in damage. That fire was caused by an overheated air compressor and was contained to the warehouse.

ConAgra spokesman Bill Nixon said Wednesday afternoon he did not have an estimate of damages.

"Apparently we had a total loss," Nixon said.

State officials said the plant was last inspected by the Tennessee Occupational Safety and Health Administration in early 1983, but no safety hazards were found.

The dead, missing and injured

Dead

Harvey Chamberlain, 48, Mascot. ConAgra employee.

Missing

Ed Henderson, 47, ConAgra employee.
Charles "Gene" Ferguson, 63, ConAgra employee.

Injured

St. Mary's Medical Center

Ronald McGaha, 31, of 3608 Bell Green Lane. Self-employed independent trucker. Admitted for head injury in satisfactory condition.

Ralph Brown, 62, 5809 Rutledge Pike. He also is a self-employed independent trucker. Admitted for multiple fractures in satisfactory condition.

Ft. Sanders Medical Center

Larry Clark, 26, Rogersville. Admitted for fractured right leg and back. In surgery for a leg injury. Employer is Horton Feed and Seed and was customer at ConAGra.

Betty King, 43, Powell. Treated for shock and dismissed. ConAgra employee.

Jody Bateman, 31, Hastings, Fla. Treated for head laceration. Truck driver.

Larry Grant, 33, 104 Thomas Drive, Maryville. Minor foot injury. Police officer.

Benjamin Franklin Doughty, 40, 102 Sutters Mill Lane, Knoxville. Minor back injury. Firefighter.

University Hospital

Tim Douglas, 24, 1236 Crestbrook, Knoxville. Treated for smoke inhalation. Paramedic.

Joe Lawson, 29, Morristown. Treated for smoke inhalation. Paramedic.

Mike Macedonia, 25, Knoxville. Treated for smoke inhalation. Paramedic.

Mark Hart, 29, Maryville. Treated for carbon monoxide inhalation. Paramedic.

Major Knox fires over past 10 years

July 21, 1974: Damaged neared $3 million in a early morning fire which destroyed two businesses — Dollar General Store and Revco Drug Store — on the Promenade in downtown Knoxville. It was called the largest fire in downtown since the 1897 Gay Street fire which destroyed much of the business district.

September 1975: A blaze which destroyed City Lumber Co. on North Central did $600,000 damage.

Jan. 22, 1976: Losses were estimated at $750,000 in a fire which damaged the Silver Manufacturing Co. furniture plant on 2742 Hancock Street.

March 9, 1976: Damage was estimated between $500,000 and $800,000 in a fire which destroyed Hauck Oil Company in West Knoxville.

Nov. 26, 1976: Five children died and four people were injured in an early morning fire at 1025 Eleanor Street. That same day, a fire destroyed the Knoxville Magazine Co. on Dutchtown Road. Damages estimates varied between $800,000 and $1.4 million.

Feb. 3, 1977: Three large apparel factories on Fort Sanders Street north of the University of Tennessee campus was destroyed by mid-afternoon blaze. Damage estimates neared $10 million.

Feb. 26, 1978: An evening fire gutted the warehouse and auditorium of Volunteer Helpers Inc. on Gay Street.

March 10 and 15, 1978: Separate fires did more than $1 million damage at Karns High School.

Dec. 11, 1978: An explosion and fire at the Knoxville Board of Education, 101 East Fifth Street, damaged the building.

March 22, 1979: Four are injured as the Cherokee Boulevard home of Kristopher Kendrick is damaged in an early morning fire. Damage reached $450,000.

Jan. 16, 1982: A mobile home fire in rural west Knox County killed three children.

March 17, 1983: A mother and her two children die of smoke inhalation in a North Knoxville apartment.

Aug. 1, 1983: A mid-afternoon fire raced through a 24-unit Wesbridge apartment building in west Knox County, destroying the structure.

Oct. 2, 1983: One man died and a $700,000 loss was reported as a 24-unit Timbers West apartment building was destroyed in a pre-dawn fire.

Some major fires in Knoxville and Knox County this year:

Jan. 9, 1984: A 5 a.m. fire on Cumberland Avenue did $660,000 worth of damage and destroyed three businesses, The Best Italian Restaurant, the North China Inn and the Book Peddler.

Jan. 20, 1984: Two children, aged two and three, died in an early morning mobile home fire in north Knox County.

Jan. 24, 1984: Two men die in a Raccoon Valley Road mobile home fire.

Jan. 31, 1984: A spectacular blaze destroys a Jackson Avenue warehouse in downtown Knoxville. Damages reported at $30,000.

Feb. 1, 1984: An explosion and fire at West Knoxville Baptist Church causes $250,000 worth of damage.

April 26, 1984: A 6:30 p.m. at Holiday Van Lines warehouse, 2323 Chipman Street, caused $750,000 worth of damages to the structure and contents.

Rumors, worry, joy envelop victims' families

By RANDELL BECK
Journal Reporter

Dazed with worry, Margaret Brown leaped from the car that had just raced up the emergency room driveway at St. Mary's Medical Center.

Her husband, Ralph Brown, was missing.

"Has he been brought to St. Mary's?" she asked no one in particular. Her voice shaking, the woman gave her husband's name to the emergency room receptionist and waited.

A second of silence.

Then: "He is here and he's all right."

Margaret Brown, who will celebrate her 63rd birthday today at the side of her husband's hospital bed, seemed near collapse.

Then she stiffened and began moving toward the emergency room.

"I want to see him," she said.

Nurses again assured her that her husband was fine. They began to lead her from the emergency room, where Brown was being treated.

"I just want to see him and touch him," Brown said. "I'm not as upset as you think I am . . . If he hears my voice he'll be all right."

With their daughter, Jo Evans, the Browns soon were reunited.

That story was repeated again and again Wednesday as relatives and friends of ConAgra Inc. workers sought news at St. Mary's and Fort Sanders Regional Medical Center in the wake of the explosions and fire which leveled the plant.

They began arriving at St. Mary's at noon: mothers clinging to daughters, husbands and wives fighting tears.

Doctors were paged to come to the emergency room. Extra supplies of blood were brought to the hospital.

Nurses went to a makeshift waiting room — an auditorium — where anxious families were to await word of their relatives' whereabouts.

Deborah Keeton, assistant director of social work at St. Mary's, said she was in contact with other hospitals and officials at the plant. Relatives gave their names as they came in the room and then gathered in small groups to wait for any news.

Scraps of news filtered in.

Fed to one group, information was passed on to another. Nurses fought rumors that inflated the number of dead and injured to incredible proportions.

Sometimes rumor is all a family had.

"The hardest part is waiting," 70-year-old Randy Smith said softly. He retired from the feed plant five years ago, but came to the hospital to learn about friends who still work there.

Priests fanned through the waiting room, praying with some families that ached for news — good or bad — and rejoicing with others that had just learned that a worker was uninjured.

The family of Mitch Ivey, a plant worker, fell into the latter category. Learning Ivey had remained at the feed plant to help relatives cried. They hugged each other.

"It's over now for us," one of Ivey's relatives said with a smile.

Betty Jean King, 43, another ConAgra employee, could say the same thing. She was treated at Fort Sanders for some cuts she received as shards of glass flew about during the explosion.

"I'm still shocked, but I'm okay," King said from her Powell home. "I'm going to be all right."

From his room at St. Mary's, Brown said he had been watching an employee load grain into his trailer when an explosion "seemed to come up from underneath" the plant.

"It was an awful noise," said Brown, an independent trucker who suffered a fractured back when something fell on top of the trailer. The 62-year-old Brown, who was to haul the grain to North Carolina, was trapped in the trailer for a short time.

Relieved to find her husband but still dazed from the events of the past two hours, Margaret Brown stood at the door of the hospital room.

"I guess the worst part is over," she said. But the fate of the employee who was loading Brown's trailer is less certain.

"We don't know what happened to him," she said.

Plant worker: 'I'm still praying'

ConAgra explosions leave employees, residents in state of shock

By PHIL JURIK
Journal Reporter

Henry Brummett had been atop the grain elevator just five minutes before, and Dean Humphrey was headed that way.

Less than a block away, Okla Beard was taking a bath. Next door, Lucy Relford was talking to her sister.

Two devastating explosions later, Brummett and Humphrey were running for their lives and Beard and Relford were wondering whether all the walls in their homes would still be standing.

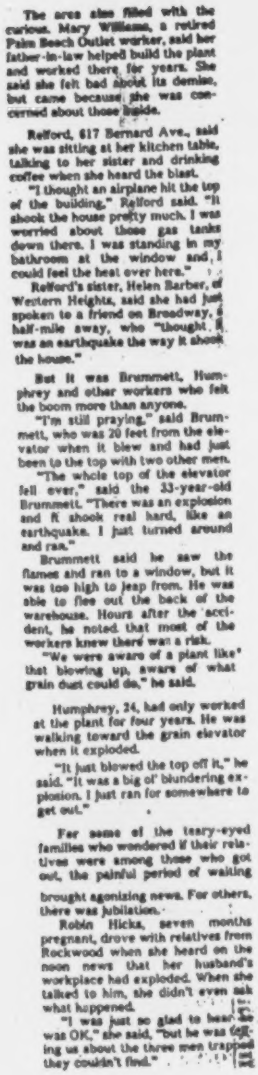
A calm, comfortable Wednesday morning complete with cloudless skies underwent a metamorphosis — the calm shattered by sirens, the comfort evaporated by intense heat and the cloudless sky stained by a steady, black plume of smoke.

Bernard Avenue, which was closed, and the other streets surrounding the ConAgra Inc. plant became a parking lot for fire trucks, rescue squad vehicles, police cars and ambulances. Everywhere, there were fire hoses.

Beard, a small, elderly woman, stood in front of her house at 615 Bernard Ave., hoping to spot her daughter who was to drive her from the neighborhood.

"I was in the bathtub," she said. "I thought the whole bathroom wall was falling in on me. Like to scared me to death. I'm leaving. I'm afraid."

Police did not order any evacuations of the area, but several surrounding businesses voluntarily closed, including Brookside Mall, Palm Beach Outlet, the KUB gas plant, Lee Street post office, Knox County Health Department and Child and Family Services.



The area also filled with the curious. Mary Williams, a retired Palm Beach Outlet worker, said her father-in-law helped build the plant and worked there for years. She said she felt bad about its demise, but came because she was concerned about those inside.

Relford, 617 Bernard Ave., said she was sitting at her kitchen table, talking to her sister and drinking coffee when she heard the blast.

"I thought an airplane hit the top of the building," Relford said. "It shook the house pretty much. I was worried about those gas tanks down there. I was standing in my bathroom at the window and I could feel the heat over here."

Relford's sister, Helen Barber, of Western Heights, said she had just spoken to a friend on Broadway, a half-mile away, who "thought it was an earthquake the way it shook the house."

But it was Brummett, Humphrey and other workers who felt the boom more than anyone.

"I'm still praying," said Brummett, who was 20 feet from the elevator when it blew and had just been to the top with two other men.

"The whole top of the elevator fell over," said the 33-year-old Brummett. "There was an explosion and it shook real hard, like an earthquake. I just turned around and ran."

Brummett said he saw the flames and ran to a window, but it was too high to leap from. He was able to flee out the back of the warehouse. Hours after the accident, he noted that most of the workers knew there was a risk.

"We were aware of a plant like that blowing up, aware of what grain dust could do," he said.

Humphrey, 24, had only worked at the plant for four years. He was walking toward the grain elevator when it exploded.

"It just blowed the top off it," he said. "It was a big ol' blundering explosion. I just ran for somewhere to get out."

For some of the teary-eyed families who wondered if their relatives were among those who got out, the painful period of waiting brought agonizing news. For others, there was jubilation.

Robin Hicks, seven months pregnant, drove with relatives from Rockwood when she heard on the noon news that her husband's workplace had exploded. When she talked to him, she didn't even ask what happened.

"I was just so glad to hear he was OK," she said, "but he was telling us about the three men trapped they couldn't find."

Labor demands probe of ConAgra fire

By TIM SMITH
Journal Reporter

AFL-CIO officials blasted the Reagan administration Friday for lax safety standards in the grain industry and demanded an immediate investigation into Wednesday's ConAgra Inc. blast which killed three and injured 11.

The union's statements, which were hand-delivered to the new secretary of the U.S. Occupational Safety and Health Administration Thursday, came as one of the dead workers was buried and fire investigators probed the rubble of the union plant looking for the cause of the explosions and fire.

"On behalf of the 45,000 grain elevator mill workers I represent — workers that put their life on the line everyday — I urge you to launch an immediate and thorough investigation into the cause of this workplace tragedy," Robert Harbrant, president of the Food and Allied Services Trades Department of the AFL-CIO, wrote in a letter to OSHA's new secretary, Robert Rowland. "How many more workers must die before OSHA guarantees this nation's 200,000 grain workers the protection that is their right."

Union officials said that Wednesday's blast was the 13th grain or feed mill explosion this year, bringing the death toll from such accidents this year to eight.

Debbie Berkowitz, director of safety for the Allied Services Department, said the union believes Wednesday's tragedy could have been prevented had grain and feed dust standards first proposed in 1982 been enacted.

She said the grain industry has continuously lobbied against any dust regulations and the proposals have been bottled up in OSHA hearings and studies.

"If you look at the record this year, the number of dead and injured are as high as they've ever been," she said. "What you have is this safety hazzard that the Reagan administration has chosen to ignore and it has sent a signal through the industry that they don't have to do much. You have something that probably could have been prevented but wasn't."

OSHA officials said they will leave it to the Tennessee Occupational Safety and Health office to decide if federal assistance is required.

"If they need assistance, we'll send someone," said Russ Dugger, a spokesman for OSHA's regional office in Atlanta. "But normally we do not become involved unless they ask for us. It is their area of enforcement, essentially."

Two state investigators at the site this week said they do not believe any assistance from OSHA is required. A TOSH spokesman also said that no special inspections would be conducted of other Tennessee feed or grain mills as a result of the ConAgra blast.

Jack McDavitt, a spokesman for OSHA in Washington, D.C., said he does not believe the federal government has unncessarily delayed proposed actions on the issue.

"I don't see how the union can say we're delaying it since we haven't done anything," he said. "It takes time, particulary when you have a hearing record as thick as this one."

McDavitt said it will probably be the end of this year or early next year before OSHA recommends any action. He said operators of small grain elevators have told OSHA officials that any such regulation would place an economic hardship on them.

Berkowitz said the union plans a demonstration in Knoxville next week to protest the lack of dust standards. She said one of the three dead workers was a steward in the plant's local of the Retail Wholesale and Department Store Union.

As government and union leaders argued over proposed standards, Harvey McClain Chamberlain was buried Friday afternoon in the Roseberry Cemetery.

Chamberiain, 48, of 102 Alco Loop, was one of three forklift operators that were killed in Wednesday's blast.

Friday's funeral for Chamberlain, the father of eight children, was attended by workers, union and company officials.

Funeral services for another of the workers, George Ed Henderson, 38, of 2025 Aster Rd., will be held Sunday at 2 p.m. at Mynatt's Chapel.

Despite blast, ConAgra will stay in Knox

SEP 25 1984

Firm cites loyal customers here

By TIM SMITH
Journal Reporter

The explosions and fire that destroyed the ConAgra Inc. plant and killed three of its workers last week will not force the company to leave Knoxville, an official said Monday.

B.J. "Jack" Farmer, president of Agribasics Co., said the company would retain its headquarters in Knoxville and may restart its warehouse operations as early as today.

"We've been here in this market for 82 years and we have a very loyal customer group," Farmer said. "Agribasics will continue to operate in Knoxville, Tennessee."

Agribasics is a subsidiary of ConAgra and has 55 facilities that produce, package and sell feed.

Company officials have been operating out of the Hyatt Regency since last Wednesday, when an explosion ripped the top off a grain elevator at the plant. It was followed by a second explosion and fire that continues to smolder in some spots this week.

The plant has been labeled a total loss by company officials, who have refused to speculate about the possibility of rebuilding the facility until after a settlement is reached with insurance adjusters. The cost to rebuild the plant has been estimated at more than $3.5 million.

The company's future has been a concern among its approximately 75 workers, all of whom have remained on the payroll since the blast.

Farmer said the company's decision to remain in Knoxville does not mean every worker will go back to work immediately. But, he said, "We're going to keep all the workers on the payroll until we decide differently."

Farmer said the company hoped to lease office and warehouse space today to begin operations. He said he did not know how many workers would be used in such operations.

All of the company's workers have been asked to return to the plant site today to be interviewed by fire investigators and officials with the Tennessee Occupational Safety and Health office.

Monday provided investigators with the first opportunity to examine the concrete elevator in which the blast started.

Jim Sibley, one of two TOSH officials investigating the fire, said Monday's examination points to a cause somewhere above the first floor.

"It's definitely above that," he said. "But we're going to have to go up the outside to find out what's at the top."

Fire investigators are expected to get a look into the top of the structure sometime today with the help of a crane.

An AFL-CIO official said Monday that she has been told the fire started in the "bucket elevator leg," the vertical conveyor system which transports grain from the bottom of the elevator to the top, where it is sent down to individual bins.

But Deputy Fire Chief Clyde "Pip" Parker said the origin of the fire, although believed to be in the upper portion of the elevator, has not yet been determined.

Parker said fire officials have taken photos of the top of the elevator and will piece them together with shots of the fire as it developed last week to help determine what happened.

He said the fire department will keep firemen at the site until all the hot spots have been extinguished.

Mich. expert called in to probe ConAgra fire

By TERRY McWILLIAMS SEP 28 1984
Journal Reporter

~~Federal~~ Occupation Safety and Health Administration officials have summoned a Michigan expert to determine what caused explosions that virtually leveled Knoxville's ConAgra Inc. feed mill plant last week.

Dr. C. William Kauffman, a University of Michigan research scientist who studied grain dust explosions for a special U.S. task force, will arrive today and begin his investigation over the weekend, officials said.

"Like the rest of us have been doing, he'll be looking for the cause (of the blasts)," said Jim Sibley, one of two Tennessee Occupational Safety and Health (TOSH) officials investigating the explosions.

The blasts, which killed three and wounded 11, comprised the worst grain dust-related incident since April 1981, when nine died and 30 were hurt in a grain elevator explosion in Corpus Christi, Texas. Eight people have died so far this year in 13 explosions across the country.

Sibley said he learned Wednesday that ~~federal~~ OSHA officials would send an expert to the ConAgra plant, which manufactured farm animal feed under the AgriBasics subsidiary's Formax brand.

"When a situation like this comes up and if it looks like help is needed, they (the state) will get it," Sibley said.

National AFL-CIO labor leaders last Friday demanded that OSHA "launch an immediate and thorough investigation" into the causes of the explosions and resulting fire, but Atlanta regional OSHA officials responded they wouldn't send anyone unless the state asked for assistance.

Vicki Keeton, a spokesperson for the Tennessee Department of Labor, said Thursday the state had not requested federal OSHA to investigate the ConAgra incident.

"We have asked that Mr. Kauffman assist us in an advisory manner," she said.

But Debbie Berkowitz, director of safety for the union's Allied Services Department, contended OSHA was sending an expert in response to a call from the state.

"It's important that OSHA brings in someone to investigate this," said Berkowitz, who planned to arrive in Knoxville from Washington today to meet with local union leaders.

Kauffman, who couldn't be reached for comment Thursday, led a team of experts to investigate the causes of 14 grain elevator explosions during a National Academy of Sciences study of the problem between 1978 and 1981.

In an interview last week, Kauffman said explosions can be prevented. But he said they will continue to occur unless standards are implemented.

"It's not going to change, no matter who many times we study it," he said. "Four of us went to explosion sites, went through the rubble and identified ignition sources. We were successful. We were like the National Transportation Safety Board was with aircraft crashes. We'd find whether there was grain dust, an ignition source and find out why it ignited."

10-3-84

Cause of ConAgra fire still unknown

By TIM SMITH
Journal Reporter

After two weeks of probing and the advice of two national consultants, ConAgra officials said Tuesday they cannot determine the cause of the explosions and fire that destroyed their plant on Sept. 18.

"Right now it appears doubtful we will determine the cause of ignition," said Bill Nixon, a ConAgra spokesman. "We don't know where else to look."

ConAgra officials had hoped that an examination of the site by experts Saturday and Sunday would answer questions about the fire's cause.

But Nixon said the experts, Dr. C. William Kauffman of the University of Michigan and E.E. Taylor of Dallas, left without any determination of cause.

Nixon said officials have determined that there were two explosions and that they occurred in the bottom of the No. 3 grain elevator and near the top of the elevator building.

"We think the bottom one occurred first but we don't really know," he said.

Kauffman, a member of a federal task force which looked at grain dust explosions, was asked to examine the site by the Tennessee Occupational Safety and Health office last week.

Taylor, an engineer who specializes in grain explosions, was requested by ConAgra's insurance adjusters.

Kauffman declined to reveal his findings of the investigation, but indicated that he had an opinion concerning the fire's origin.

"I think in this situation it would not be appropriate for me to say, 'hey, I found X, Y and Z,'" Kauffman said. "It was a representative grain elevator explosion."

Kauffman would not comment on ConAgra's opinion that the causes are unknown, except to say that there is no single cause of any grain dust explosion.

"I think I have gotten the current information to people who can and should do something, people who can act on the problem of grain dust explosions," he said. "I think the investigation will help prevent additional explosions."

Jim Sibley, one of two TOSH investigators probing the ConAgra blast, said his agency is awaiting a report from Kauffman in the next 30 days before closing the case.

"I think it's pretty much the consensus of everyone at this point that the cause has not yet been determined," he said.

One official who is actively searching for an answer is Capt. John Stooksbury, an arson investigator for the Knoxville Fire Department who is probing the blaze.

"We're going to keep looking at it," Stooksbury said. "We still want to look around the top of the elevator. So far we've only been able to look at it while hanging from a crane."

Stooksbury said some possible causes such as bearings at the bottom of the elevator and the propane tanks which power the tow motors have been ruled out.

He said he wants to closely examine the belts and bearings at the top of the structure for possible clues.

"They say the causes of only about three out of every 10 grain explosions are determined," he said. "But we never close an unsolved case."

Stooksbury said he will examine the structure more closely after ConAgra finishes the removal of grain from the elevator during the next two days.

ConAgra is also removing grain this week from Second Creek, Nixon said.

The company hired an Ohio firm which is using a vacuum truck to suck the fermenting feed from the banks and bottom of the waterway.

State water management officials said the feed could pose a danger to any wildlife in the creek because the fermentation depletes oxygen in the water.

OCT 24 1984

20-30 workers laid off

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By TIM SMITH
Journal Reporter

Plans to rebuild ConAgra Inc.'s Knoxville plant have been scrapped and half of the company's production force has been laid off, ConAgra officials confirmed Tuesday.

The workers were given the grim announcement Monday, after a panel of union workers was informed that the feed company could not afford to rebuild the Van Street plant in Knoxville.

Among those who found themselves unemployed Tuesday was Fred Keeney, a 57-year-old worker who helped save three lives during a fire at the plant which killed three people and injured 11 others.

"For a month or two we can survive," said Keeney, a 15-year employee. "But after that it's going to get rough. It won't be easy to get work. I'm 57 years old. I'm in pretty good health. But I'm not skilled in anything."

Bill Nixon, a ConAgra spokesman, said about 20-30 workers were laid off this week and were being assisted in their search for work.

"We will likely not rebuild a production facility in the city limits of Knoxville," Nixon said in a prepared announcement. "If a decision to rebuild were made already, it would be 18-30 months before it could be used. Because of this it's necessary to lay off certain production personnel for whom there is no work."

Tuesday's statement was in sharp contrast to the optimism that came from ConAgra officials' lips shortly after the Sept. 19 fire.

Officials said then that they expected to remain in Knoxville, although they were reluctant to detail just what operations and workers would be kept.

"Initially, before we had time to sift through the facts, our hope was we could rebuild," Nixon said. "But when you sit down at look at logic, it doesn't make sense."

Nixon said the company will retain its other operations — marketing of fertilizer and seed and the headquarters of Agribasics Co., a subsidiary — but may lay off more production personnel in the future.

He said the replacement cost of the plant, estimated to be almost $9 million, as well as problems with accessibility caused by a single driveway, forced ConAgra officials to decide against rebuilding.

"It's just not logical to put that much money into a site that is not that accessible," he said.

Gary L. Payne, president of the union local at the plant and one of those not being laid off, said the news was not entirely a surprise.

"They were saying they would service their customers but they would never come out and say they would rebuild," he said. "A few of the workers were shocked. But most of them accepted it. In this business, you can't drag your foot too long or you'll lose money."

Payne said the union was concentrating now on trying to help those out of work.

Keeney also was a member of the union committee that was told first of the firm's decision Monday.

"They called us in first," Keeney said Tuesday. "Then they called in the rest and told them they were being laid off. We all feel bad about being out of work. But we don't blame management."

Keeney said he is uncertain about his own future. But he said he hopes he can find something soon to help support his wife and 27-year-old retarded son.

Keeney said he filled out a resume Tuesday and was told Con-Agra officials have found some jobs at other area plants.

"There are some who have been working there 30 years," he said. "That's all they've ever done. I think we all feel pretty flat about it."

Nixon said although the plant was insured, he does not know if the insurance will pay the total replacement costs.

Cause of the three-alarm fire has not been determined. Nixon said insurance investigators have allowed the company to clean up the site except for the grain elevator tower that exploded and an elevator at the southeat corner of the plant.

Knoxville fire investigators are expected to inspect the motor assembly at the top of the grain elevator once it is removed to determine if bearings in the assembly could have caused the explosions.

ConAgra violated state law on safety

State OSHA panel fines firm $1,000

By TERRY McWILLIAMS
Journal Reporter

Tennessee's Department of Labor has found that ConAgra Inc. allowed hazardous levels of highly explosive grain dust to accumulate at its Knoxville animal feed plant prior to a violent September explosion that killed three workers.

After a three-month investigation, the state's Occupational Safety and Health Administration Thursday cited the firm for violating a state law protecting workers from "hazards which are likely to cause serious physical harm."

The agency fined ConAgra $1,000, the maximum penalty.

Organizations lobbying for a federal grain dust standard praised the state action to issue citations, but criticized the fine levied against ConAgra.

"The problem is when people die and the penalty is so low you think, 'So what, what good is OSHA doing?'" said Deborah Berkowitz, safety manager for the AFL-CIO's Food and Beverage Trades Department.

"But I think you can't just look at the penalty. You have to look at the fact that OSHA did something, that OSHA cited an employer for too much grain dust.

"That in itself is a significant act because under this (Reagan) administration, there have been very few citations issued. The federal OSHA has capitulated to the grain industry, and I think the Tennessee OSHA ought to be commended (because the action) is very brave of them," she said.

OSHA said the company allowed volatile grain dust — microscopic material that has more explosive power as equivalent amounts of TNT — to build up in the basement and the work floor in its grain elevator.

An unexplained spark set off an explosive fireball, which roared through the elevator and smashed through parts of the building, causing a shower of concrete chunks and sparking a massive fire, the report said.

Investigators also determined adequate safety precautions weren't taken in another crucial area — venting the top of a grain elevator

— a move which would have lessened the intensity of the explosion.

AgriBasics Division President B. Jack Farmer Jr. said company officials will meet with the Labor Department within the 20-day appeal period to discuss the findings and the agency's fine.

"I don't know if we particularly agree with it (the findings)," Farmer said. "The fact of the matter is, we probably weren't in violation. But we did have a fire of pretty big magnitude."

State investigators, who were helped by a University of Michigan grain dust expert, could not pinpoint the exact cause of the Sept. 19 explosion, which also injured 11 people and caused $3.5 million in property damage at the 78-year-old Van Street plant.

Jim Hooper, chief of the agency's safety compliance division, said the agency identified several possible sources.

"But in this case, the fire afterwards, the explosion damage and everything falling down on top of it destroyed the evidence. We never saw anything physically where the ignition source was," Hooper said.

The Michigan consultant, Dr. Charles W. Kauffman, narrowed the initial spark to an area near the grain elevator's buckets, a grain sifter and a corn crusher, and found some evidence that the third machine may have been responsible.

Kauffman also criticized safety precautions inside the "headhouse," an area where grain handling equipment is stored, failed to lessen the explosion's force.

"This elevator headhouse had the fewest number of windows that the author has ever encountered (and they) provided an insufficient venting area for the high-pressure gases produced by an secondary explosion," Kauffman said.

Farmer said the company's internal investigation also didn't pin down the ignition source, and he said the reason would probably remain unknown.

The Knoxville explosion was one of 18 blasts at U.S. plants in 1984 attributed to grain dust, causing 28 injuries and 9 deaths.

Since the explosion, the plant has furloughed half its 30-member production force and intends to announce further lay-offs, the firm's president said Thursday.

ConAgra disputes state citation blaming company for explosion

By TERRY McWILLIAMS
Journal Reporter

ConAgra Inc., whose Knoxville grain elevator exploded last September and killed three workers, is contesting a state citation that claimed the company allowed dangerous levels of volatile grain dust to accumulate.

Instead, top safety officials for the $5.5 billion food products company contend that the explosion may have been fed by a leaking propane tank from a forklift truck close to the elevator.

The company isn't challenging the state's $1,000 proposed fine.

ConAgra's response came in a Jan. 2 letter to the Tennessee Department of Labor, in which the company says it has "serious concerns" about the State Occupational Safety and Health Department's allegations.

The state cited ConAgra after a three-month investigation for violating a state law that protects workers from "hazards which are likely to cause serious physical harm."

ConAgra, which manufactured animal feed at its AgriBasics Co. plant on Van Street, outlined four areas in its appeal where they think the state's citation is wrong. They disputed state contentions that:

- The plant violated national fire safety standards.
- The company allowed explosive grain dust to accumulate.
- An explosion loosened grain dust and caused a second, more powerful explosion.
- The explosion itself was a "grain dust" explosion.

Labor Department spokesman Vicki Keeton said state officials "are not prepared to amend our citation, but at the present time we are considering their arguments."

In the letter to the state, Corporate Safety Director Wayne Bellinger said the time span between the sound of the explosion and walls falling in the top of the grain elevator "is not consistent" with the time needed for a dust-fueled explosion.

Microscopic bits of grain dust, under the right conditions, can be as explosive as a similar amount of TNT, experts say.

But instead of grain dust, the company said evidence showed a mixture of gasoline or propane gas could produce the correct time span.

". . . Such a mixture could have developed from a leaking gasoline tank on the truck nearest the elevator or from the forklift truck that was operating on the deck at the time of the explosion," Bellinger said.

Bellinger denied that grain dust was allowed to accumulate in the basement and workfloor areas, saying that grain dust present before the explosion was still there afterwards. Whole and partial corn kernals, not grain dust, was present after the explosion, he said.

The company said no evidence existed that a secondary explosion occurred, or if it had, even started, around the basement and workfloor areas of the elevator. The primary explosion could have come from pressures that built up in the headhouse, an area in the top of the elevator where the motors are located to move the grain.

A ConAgra spokesman wouldn't comment directly on how the company arrived at their response.

The state citation, issued last month, cited the National Fire Protection Association's standards in claiming that too few windows were provided in the headhouse — which would minimize an explosion. The state also said the company failed to install systems that would reduce grain dust from accumulating.

But ConAgra, in its letter, insisted that the national fire standards — published in 1980 — don't apply to the Knoxville structure because it was built in 1919. ConAgra said that citations resulting from applying those fire safety standards have been "consistently" overturned by OSHA judges.

The company said it would accept another citation — which would still keep ConAgra in violation — but would charge the company with failing to keep the elevator free of "unknown materials that constituted an explosion hazard."

Keeton said the state has a week to forward ConAgra's letter contesting the citation to an administrative law court. Then, the state has another 20 days to file a written complaint again outlining the allegations against ConAgra. The company has a month to respond to those allegations.

Keeton said the two sides could settle the state's complaint at any time, but no informal negotiating sessions have been scheduled.

"It's our position that it's in the state's hands," said Jack Farmer, Knoxville-based president of Agri-Basics Co. "We'll work with whatever the state wants to do."

Last September's explosion and resulting fire at the Van Street plant, which also injured 11 people, caused an estimated $3.5 million worth of damage. There were 18 blasts at U.S. plants attributed to grain dust in 1984, with 28 injuries and 9 deaths.

ConAgra agrees to pay penalty

3-21-5

Firm settles with state, denies breaking law

By TERRY McWILLIAMS
Journal Reporter

ConAgra Inc. has agreed to stop fighting a state safety citation and pay a $1,000 penalty for conditions that led to a violent grain elevator explosion and three worker deaths last September.

But while the company agreed to pay the maximum penalty for "hazards likely to cause serious harm," ConAgra denied any guilt or responsibility for any state law violations at the animal feed manufacturing plant.

"As best I can tell, the agreement was signed to get the matter resolved for both sides," said ConAgra spokesman Lynn Pherris.

State officials said they were satisfied with the agreed order.

"The company abated the problem and paid the penalty," said Labor Department spokeswoman Vicki Keeton, who announced the out-of-court settlement Thursday.

"Any time we can come to an agreement with a company rather than go through the review process and possibly go to court, we're satisfied to settle," she said.

After a three-month probe, state investigators determined the explosion and resulting fire at the 78-year-old AgriBasics Co. plant was caused by excessive accumulations of volatile grain dust — a microscopic material which under the right conditions has more explosive power than equivalent amounts of TNT.

Investigators also found the $5.5 billion food products company failed to take safety precautions by adequately venting the top of the grain elevator. That move would have lessened the intensity of the explosion, which caused $3.5 million in property damage and injured 11 people.

ConAgra formally disputed the findings, contending instead the explosion was probably caused by a leaking propane or gasoline tank on a nearby forklift truck. The case had been scheduled to go before an independent review commission later this month.

According to the agreed order, any OSHA violations and allegations listed in the state citation aren't necessarily true. In addition, the agreement can't be used to place liability on the company in a lawsuit filed against the company.

People seeking compensation in court over the explosion probably won't be unduly hampered by that restriction, said Debbie Berkowitz, safety manager for the AFL-CIO's Food and Beverage Trades Department.

"I'm not so sure the people who were killed or injured in this incident will be left abandoned by OSHA. The investigation and the reports by OSHA was fairly strong in its conclusions about company maintenance and company health and safety procedures, and all the evidence . . . is still available and still can be used."

At least two lawsuits have been filed against the company.

The settlement, reached after three months of negotiations, was hailed by organizations lobbying Congress for a tougher grain dust standard.

"This is very significant that the Department of Labor was successful in standing by the general duty clause citation," Berkowitz said.

The "general duty" rule, successful in prosecuting only a handful of grain industry cases over the last decade, requires firms to provide a workplace free of hazards which would likely to cause serious physical harm.

"This says to me that the evidence was overwhelming against ConAgra and OSHA really had a good case. Tennessee's OSHA was very responsible in its investigation and it had enough evidence to sustain the citation," she said.

"This is going to have a national effect. It's going to signal to other state OSHAs that they can use the general duty standards, and on the other hand, it'll send a chill through the (grain handling) industry. They're put on notice: the general duty standard can be used."

ConAgra plans new warehouse

By TIM SMITH
Journal Reporter

Nine months after a fiery explosion destroyed ConAgra's Knoxville feed plant the company is planning to build a warehouse on the old site, officials said Thursday.

But none of the employees who were laid off as a result of the fire will be rehired.

Lane Fentress, general regional manager for the ConAgra subsidiary that operated the plant, said Thursday that the company is in the process of approving bids for a 20,000-square-foot warehouse to be operated by the James Mill, the Willow Street firm which has contracted with ConAgra to handle its retail and wholesale business.

"Their site is not adequate," Fentriss said. "So at this point we're pretty far down the road in making a decision to expand their facilities. And the bottom line is it probably will be in a facility on our old site."

The September explosion and fire killed three people, injured 11 and almost leveled the 78-year-old Van Street plant.

ConAgra officials initially said they believed they could rebuild the plant but later scrapped the plans after determining they were too expensive. The building had an estimated value of $3.5 million but officials said it would cost $9 million to replace.

Fentriss said the warehouse will cost between $255,000 and $345,000 and could be completed within four months from the time a contractor is selected.

He said the warehouse will allow the firm to expand its business into "a full line of metropolitan feed and grain" products, including lawn and garden items.

He said no ConAgra employees would be rehired since the facility will be part of the James Mill firm.

City officials said ConAgra applied for a building permit about a week ago for a warehouse measuring 100-by-200 feet. They said modifications are being made in the plans to comply with city codes.

ConAgra blast draws $3M suits

By TERRY McWILLIAMS
Journal Reporter

Sep 1

The widows of two ConAgra workers killed in an explosion a year ago filed lawsuits Tuesday against the plant's union and the manufacturer of a forklift truck, claiming they were partially responsible for the deaths.

Harvey Chamberlain and Charles Ferguson, and another man, were killed when an explosion ripped through a grain elevator at the AgriBasics Co. in North Knoxville, a ConAgra Inc. subsidiary which manufactured animal feed.

One set of lawsuits, filed by Juanita C. Chamberlain and Shirley Ferguson Mize against the forklift's manufacturer, Caterpillar Tractor Inc., and the company which serviced it, alleges the machinery caused the fire and the massive explosion at the 78-year-old plant.

Chamberlain and Mize also alleged in another set of suits that both the local union, the Retail, Wholesale and Department Store Union Local 167, and its AFL-CIO parent were negligent in reporting safety violations which contributed to the blast.

Each is asking for $3 million in damages.

Lawsuits against the Tennessee Occupational Health and Safety Administration, other state agencies, ConAgra Inc. and AgriBasics Co. are expected to be filed today, said Dennis B. Francis, the lawyer who represents Chamberlain and Mize.

The filing against the unions claims the area around the grain elevator violated several state and federal safety laws. The union had a duty to ensure a safe workplace, but failed to comply with its contract with ConAgra to establish a safety committee. As a result, the workplace was allowed to become unsafe, the suits argue.

Debbie Berkowitz, safety manager for the AFL-CIO's Food and Beverage Trades Department, said the claims against the local union — now defunct — and the international "will probably be thrown out very quickly."

"The duty of a union is to represent the people to the best of their ability. . . The union cannot make unilateral changes in a plant. They can merely bargain for it as best as they can.

The other lawsuits accuse Caterpillar of manufacturing a defective forklift, or tow motor, and failing to provide proper directions for using the vehicle.

The Bailey Company Inc., which is licensed to perform work on Caterpillar products, was negligent in maintaining the forklift, the suits said, particularly a safety ring which kept the vehicle's propane tank from leaking.

State and city officials ruled they don't know what caused the explosion, but said it was fueled by volatile grain dust. ConAgra paid a $1,000 fine under an agreed order, but denied any guilt or responsibility for any state law violations.

The tragedy is, it could happen again

By TERRY McWILLIAMS
Journal Reporter

Air Force veteran Lamar Younger saw countless aerial bombings, but none, he says, could compare to the rumbling thunderclap that ripped apart a ConAgra grain elevator a year ago.

"It was one of the most devastating things I've ever witnessed," says Younger, a 32-year-old Knoxville postal employee.

Younger was sorting letters at a nearby postal warehouse when he heard a loud hiss — similar to an open air hose — coming from the animal feed plant.

A split-second later, a thunderous explosion rocked the Van Street facility and shook the ground where he stood. Chunks of concrete as big as bowling balls rained onto the postal roof. Within minutes, a 100-foot-high firestorm swept through ConAgra's warehouse and offices.

Three ConAgra workers were killed. Eleven were injured.

He says he watched in horror as panic-stricken women and injured workers fled down railroad tracks that pass by ConAgra and the Postal Service warehouse. He remains shaken today.

"Even now, I look over there occasionally and I think it seems ironic that here's a multi-million-dollar company that is still doing business as usual — and yet there are people dead, people that I'm sure I saw working out there. It's still scary."

Knoxville wasn't the only facility to suffer such a devastating explosion. They happen with regularity. More than 100 have occurred since 1980, building a death toll of 40 and hundreds of injuries.

With its three deaths, the Knoxville AgriBasics explosion represented the largest loss of life since a 1981 blast at a Corpus Christi, Texas, grain elevator.

And since that hot, sunny September day a year ago, Knoxville's blast remains the largest of the 17 subsequent explosions at U.S. grain elevators — blasts that killed one person and injured 14.

"Clearly, the explosion in Knoxville was absolute proof that a (safety) standard could save lives, and that's the tragedy," says Deborah Berkowitz, a safety officer with the AFL-CIO's Food and Beverage Trades Department.

Like most grain facility explosions, experts say an excessive buildup of volatile, microscopic grain dust was responsible for the blast at Van Street. What's "excessive," however, remains the subject of a national debate about safety — a debate Knoxville was violently thrust into.

If dry grain dust and oxygen are mixed in the right proportions — and there's a spark — the result is deadlier than TNT, as workers at the Knoxville plant saw first hand.

Dust accumulations smaller than 1/64 inch on elevator walls and floors have fueled explosions, prompting experts and union officials to support a strict measure to keep grain elevators clean and well-ventilated. The federal Occupational Health and Safety Administration (OSHA) is studying a 1/8-inch standard, while industry generally supports voluntary measures.

Berkowitz claims the AgriBasics explosion sent a "chill" through the grain-handling industry, scaring many operators into tightening safety standards. Another scare, she says, resulted from a successful upheld citation issued against ConAgra by the Tennessee Occupational Safety and Health Administration.

Dr. C. William Kauffman, a Michigan grain dust expert the state summoned to probe the ConAgra explosion, contends that other factors are responsible for fewer major accidents this year.

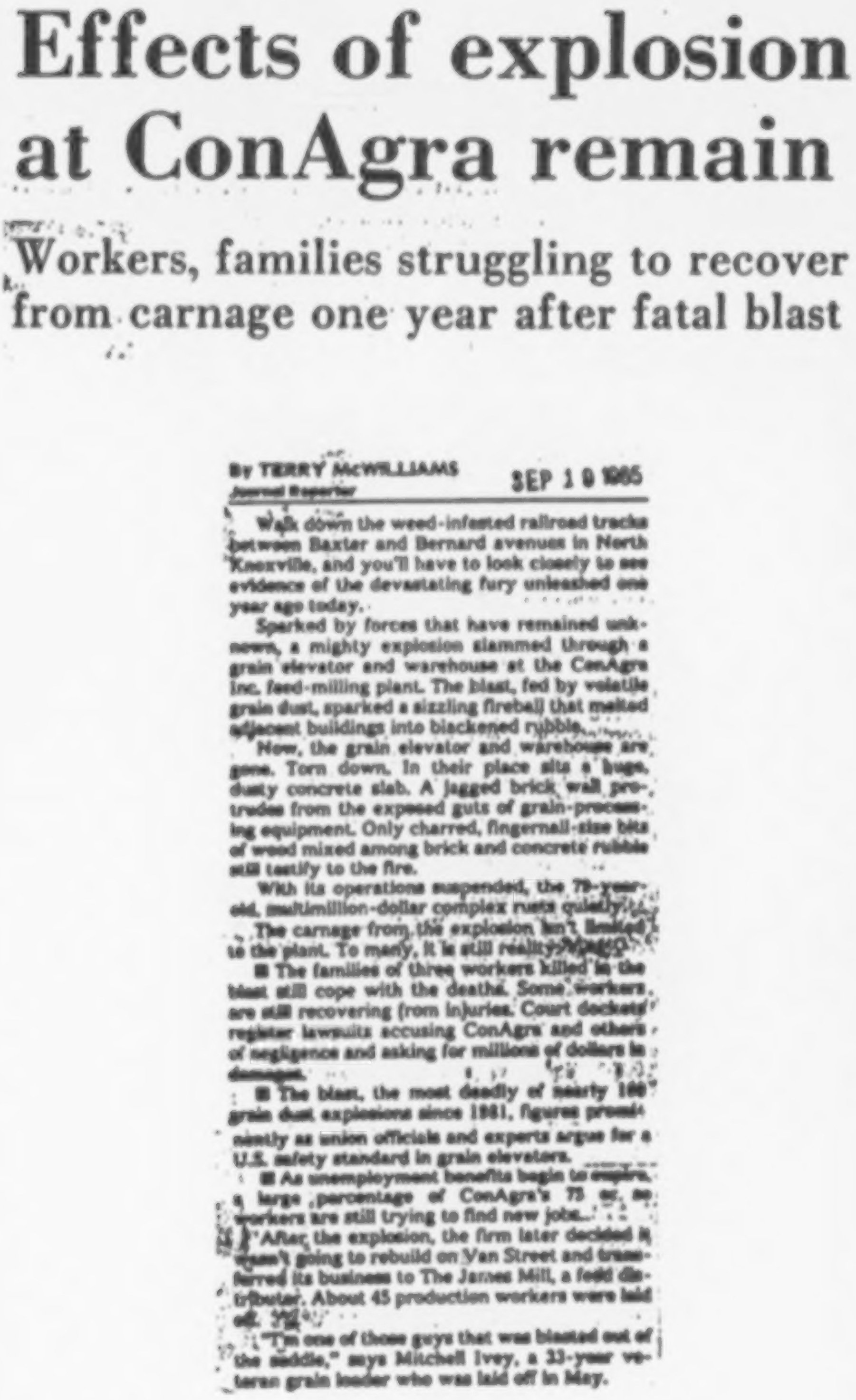
He ties lower fatalities to less grain moving through the system, growing numbers of liability suits tied to explosions and more safety practices because of sharply higher insurance rates. "We have not seen a big turnaround in the past year that's going to prevent grain elevator explosions," he says.

New standards — probably the 1/8-inch level — are expected to be issued after next January, OSHA spokesman Tom Seymour says. The delay was caused by the overwhelming public response to the grain dust safety issue, he says.

Berkowitz doesn't believe standards will be issued that soon. She says safety practices in the nation's grain elevators won't improve until the Reagan administration is out of office, or until a major catastrophe occurs. Kauffman reluctantly agrees.

"You scream and you continue to write letters and it falls on deaf ears," she says. "...The enactment of a standard will (hinge) on a tremendous loss of life, on the scale of 150 people and more than one elevator explosion.

"That's too bad that you need a body count before you can prevent something you know is going to kill people."



Effects of explosion at ConAgra remain

Workers, families struggling to recover from carnage one year after fatal blast

By TERRY McWILLIAMS
Journal Reporter

SEP 1 9 1985

Walk down the weed-infested railroad tracks between Baxter and Bernard avenues in North Knoxville, and you'll have to look closely to see evidence of the devastating fury unleashed one year ago today.

Sparked by forces that have remained unknown, a mighty explosion slammed through a grain elevator and warehouse at the ConAgra Inc. feed-milling plant. The blast, fed by volatile grain dust, sparked a sizzling fireball that melted adjacent buildings into blackened rubble.

Now, the grain elevator and warehouse are gone. Torn down. In their place sits a huge, dusty concrete slab. A jagged brick wall protrudes from the exposed guts of grain-processing equipment. Only charred, fingernail-size bits of wood mixed among brick and concrete rubble still testify to the fire.

With its operations suspended, the 79-year-old, multimillion-dollar complex rusts quietly.

The carnage from the explosion isn't limited to the plant. To many, it is still reality.

■ The families of three workers killed in the blast still cope with the deaths. Some workers are still recovering from injuries. Court dockets register lawsuits accusing ConAgra and others of negligence and asking for millions of dollars in damages.

■ The blast, the most deadly of nearly 100 grain dust explosions since 1981, figures prominently as union officials and experts argue for a U.S. safety standard in grain elevators.

■ As unemployment benefits begin to expire, a large percentage of ConAgra's 75 or so workers are still trying to find new jobs.

After the explosion, the firm later decided it wasn't going to rebuild on Van Street and transferred its business to The James Mill, a feed distributor. About 45 production workers were laid off.

"I'm one of those guys that was blasted out of the saddle," says Mitchell Ivey, a 33-year veteran grain loader who was laid off in May.

Officials of the now-defunct union say about a dozen people haven't found jobs yet.

Ivey, 57, says because of his futile job-search efforts, he may lose his home. The $120-per-week unemployment benefits cover so little, he says. His wife is also jobless.

"I enjoyed my job, and I still wish I had it . . . For us (employees), the place blowing up didn't do us any good. It was kind of our home, and when it went up, that's it. It broke us up," Ivey says.

Some of the unemployed workers blame their lack of formal education and advanced age for being turned down for jobs. Vaughn Dickenson, 59, who has a seventh-grade education, is one.

"I've spent all of my working life there, from the time I was 18. I've got very little work experience [illegible] and it's hard to find a job." His wife is bedridden and the company's extended medical benefits end next year. "I don't know what we'll do," he says.

Says unemployed ConAgra truck driver Wayne McGee, "At 42, I've kind of had to start a new life."

ConAgra official Floyd Johnson says the company did all it could to find jobs for its employees, even transferring seven people to production plants in the Southeast. It gave generous severance benefits, printed resumes and created job leads, he says. All got jobs who wanted jobs.

Lack of education is an excuse, he says.

"Maybe they're mad at ConAgra. But ConAgra didn't plan that accident," Johnson says.

ConAgra is responsible for the accident, claim a number of survivors of the Sept. 19, 1984, explosion, in a flock of lawsuits filed just before the legal time limit expired Wednesday.

Lawyer Dennis B. Francis represents Shirley Jean Ferguson Mize, whose father Charles E. Ferguson died in the blast. The attorney also represents Juanita Chamberlain, whose husband Harvey was killed.

Francis filed complaints Wednesday against ConAgra Inc., AgriBasics Co., the City of Knoxville and the Tennessee Department of Labor, seeking compensation into the millions of dollars. He also filed suits Tuesday against the manufacturer of a forklift and the company providing service for it, and against the union at the plant.

"Basically, we're suing everybody and their dog," he said.

A policeman who was injured on his way to the fire and two truck drivers injured at the plant also have filed lawsuits [illegible]

Nearly all of the complaints center around allegations that the defending parties, including ConAgra, were negligent in allowing explosive grain dust to accumulate inside the grain elevator.

The company, which paid a $1,000 fine levied by the state, signed an agreement denying guilt or responsibility for the explosion. And in the only court response filed so far, the company denied negligence in its operations. The firm contends a propane leak from a faulty forklift caused the blast.

"(ConAgra) says they were without fault for this accident which was unavoidable insofar as they were concerned, and they deny liability to the plaintiffs," the response said.

Chamberlain, 49, a mother of eight, said in June that "someone has to be responsible. My husband worked for them seven days a week for 10 years. But that doesn't mean anything."

The president of the ConAgra subsidiary, Jack Farmer, says his company didn't go unaffected. He says the blast seriously affected their feed grain business. But they've slowly recovered, and production is now coming from plants in Georgia and Alabama.

"I think we could say in a general statement that we've been able to maintain our (feed) business in a better state than anticipated," says Farmer, president of ConAgra Fertilizer Co., a new division of ConAgra Inc. Their new offices are in One Regency Square downtown.

There are plans to build a warehouse, but bids haven't been returned yet," Farmer says. The $300,000 facility may be built on the Vass Street site and operated by The James Mill firm, officials say.

"It's generally been a tough year for us," Farmer says, referring to the explosion and aftermath. "We've been involved in a lot of things we've normally not been involved in, but it appears to be under control."

POST HEARING DATA
SUBMITTED BY THE
AMERICAN FEED MANUFACTURERS ASSOCIATION
TO THE
OCCUPATIONAL SAFETY AND HEALTH ASSOCIATION
IN RESPONSE TO THE
PROPOSED GRAIN HANDLING FACILITIES REGULATION
29 CFR PARTS 1910 and 1917

July 30, 1984

The American Feed Manufacturers Association (AFMA) conducted a survey of all its feed manufacturing members to determine the frequency and severity of explosions and fires in the feed industry and to ascertain to what extent the feed industry experienced employee fatalities and injuries which could be prevented by compliance with the proposed Grain Handling Facilities Regulation.

AFMA is the national trade association for livestock and poultry feed manufacturers. AFMA members represent 70% of the primary formula feed sold in the U.S. Many AFMA members supply premix or supplements to small grinder/mixer businesses which are also feed plants. AFMA membership represents a broad cross section of the feed manufacturing industry. AFMA members include small single facility operations as well as corporations which own many large facilities.

The survey was conducted in response to OSHA's proposal to include feed mills in its proposed Grain Handling Facilities Regulation. (29 CFR Parts 1910 & 1917)

The survey results represent the responses of all 237 feed manufacturing member companies over the five year 1979-1983 period.

ALL AFMA MEMBERS RESPONDED TO THE SURVEY. THUS, NO COMPANIES WHICH COULD HAVE UNUSUAL SAFETY PROBLEMS WERE EXCLUDED.

THE SURVEY RESULTS SHOW THERE HAVE BEEN NO FATALITIES AND ONLY SEVEN PEOPLE INJURED AS THE RESULT OF EXPLOSIONS AND NO FATALITIES AND ONLY ONE INJURY AS THE RESULT OF FIRES IN FEED MILLS OPERATED BY AFMA MEMBERS IN THE LAST FIVE YEARS.

The survey results also show there has been one death due to a bin entry accident. There have been eight "other" accidental deaths during the last five years, all of which were unrelated to the proposed regulations. Three were truck accidents away from the feed mill; two were due to falls; one was a construction accident; and two were related to machinery guarding. The reported average property damage per explosions was $69,876 and was $60,090 for fires.

The assimilation of the survey data with data from other sources will be performed as part of the AFMA Risk/Benefit Analysis, which will submitted to OSHA as soon as it is complete.

Attachments:

1. Individual Company Results
2. Property Damage Results
    A. Fires
    B. Explosions
3. Survey Methodology
4. Blank Survey

Attachment 1

FEED MILL ACCIDENTS

LAST FIVE YEARS (1979-1983)

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
1		0	0	0	0	0	0	0	0
2		0	0	0	0	0	0	0	0
3		0	0	0	0	0	0	0	0
4		1	0	0	1	0	0	0	0
5		0	0	0	0	0	0	0	1
6		0	0	0	0	0	0	0	0
7		0	0	0	1	0	0	0	0
8		0	0	0	0	0	0	0	1
9		0	0	0	0	0	0	0	0
10		0	0	0	0	0	0	0	0
11		0	0	0	0	0	0	0	0
12	N/A	Company handles no grain or grain products							
13		0	0	0	0	0	0	0	0
14		0	0	0	0	0	0	0	0
15		1	0	0	0	0	0	0	0
16		0	0	0	0	0	0	0	0
17		0	0	0	0	0	0	0	0
18		0	0	0	0	0	0	0	0
19		0	0	0	0	0	0	0	0
20		0	0	0	0	0	0	0	0
21		0	0	0	0	0	0	0	0
22		0	0	0	0	0	0	0	0
23		0	0	0	0	0	0	0	0
24		1	0	0	1	0	0	0	1
25		0	0	0	0	0	0	0	0
26		0	0	0	0	0	0	0	0
27		0	0	0	0	0	0	0	0
28		0	0	0	0	0	0	0	0
29		0	0	0	0	0	0	0	0
30		1	0	0	0	0	0	0	0
31		0	0	0	0	0	0	0	0
32		0	0	0	0	0	0	0	0
33		0	0	0	0	0	0	0	0
34		0	0	0	0	0	0	0	0
35		0	0	0	0	0	0	0	0

Attachment 1

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
36		0	0	0	0	0	0	0	0
37		0	0	0	0	0	0	0	0
38	N/A	Company handles no grain or grain products							
39		0	0	0	0	0	0	0	0
40		0	0	0	0	0	0	0	0
41	N/A	Company handles no grain or grain products							
42		0	0	0	0	0	0	0	0
43		0	0	0	0	0	0	0	0
44		0	0	0	0	0	0	0	0
45		0	0	0	0	0	0	0	0
46	N/A	Company handles no grain or grain products							
47		0	0	0	0	0	0	0	0
48		0	0	0	0	0	0	0	0
49		0	0	0	0	0	0	0	0
50		0	0	0	1	0	0	0	0
51	N/A	Company handles no grain or grain products							
52	N/A	Company handles no grain or grain products							
53		0	0	0	0	0	0	0	0
54		0	0	0	0	0	0	0	0
55		0	0	0	1	0	1	0	0
56		0	0	0	0	0	0	0	0
57		1	0	1	0	0	0	0	0
58		0	0	0	0	0	0	0	0
59		0	0	0	0	0	0	0	0
60		0	0	0	0	0	0	0	0
61		0	0	0	0	0	0	0	0
62		0	0	0	0	0	0	0	0
63		0	0	0	0	0	0	0	0
64		0	0	0	0	0	0	0	0
65		0	0	0	1	0	0	0	0
66		0	0	0	0	0	0	0	0
67		0	0	0	0	0	0	0	0
68		0	0	0	0	0	0	0	0
69		0	0	0	0	0	0	0	0
70		0	0	0	0	0	0	0	0
71		0	0	0	0	0	0	0	0
72		0	0	0	0	0	0	0	0
73		0	0	0	0	0	0	0	0
74		0	0	0	0	0	0	0	0
75		0	0	0	0	0	0	0	0
76		0	0	0	0	0	0	0	0
77		0	0	0	0	0	0	0	0

Attachment 1

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
78		0	0	0	0	0	0	1	0
79		0	0	0	0	0	0	0	0
80		0	0	0	0	0	0	0	0
81		0	0	0	0	0	0	0	0
82	N/A	Company handles no grain or grain products							
83		0	0	0	0	0	0	0	0
84		0	0	0	0	0	0	0	0
85		0	0	0	0	0	0	0	0
86		0	0	0	0	0	0	0	0
87		0	0	0	0	0	0	0	0
88		0	0	0	0	0	0	0	0
89		0	0	0	0	0	0	0	0
90		0	0	0	0	0	0	0	0
91		0	0	0	0	0	0	0	0
92		0	0	0	0	0	0	0	0
93		0	0	0	0	0	0	0	0
94		0	0	0	0	0	0	0	0
95		0	0	0	0	0	0	0	0
96		2	0	0	1	0	0	0	0
97		0	0	0	0	0	0	0	0
98		0	0	0	0	0	0	0	0
99		0	0	0	0	0	0	0	0
100		0	0	0	0	0	0	0	0
101		0	0	0	0	0	0	0	0
102		0	0	0	0	0	0	0	0
103		0	0	0	0	0	0	0	0
104		0	0	0	0	0	0	0	0
105		0	0	0	0	0	0	0	0
106		0	0	0	0	0	0	0	0
107		0	0	0	0	0	0	0	0
108		0	0	0	0	0	0	0	0
109		0	0	0	0	0	0	0	0
110		0	0	0	0	0	0	0	0
111	N/A	Company handles no grain or grain products							
112		0	0	0	0	0	0	0	0
113		0	0	0	0	0	0	0	0
114		0	0	0	2	0	0	0	0
115		0	0	0	0	0	0	0	0
116		0	0	0	0	0	0	0	0
117	N/A	Company handles no grain or grain products							
118		0	0	0	0	0	0	0	0
119		0	0	0	0	0	0	0	0

Attachment 1

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
120		0	0	0	0	0	0	0	0
121		0	0	0	0	0	0	0	0
122		0	0	0	0	0	0	0	0
123		0	0	0	0	0	0	0	0
124		0	0	0	0	0	0	0	0
125		0	0	0	0	0	0	0	0
126		0	0	0	0	0	0	0	1
127		0	0	0	0	0	0	0	1
128	N/A	Company handles no grain or grain products							
129	N/A	Company handles no grain or grain products							
130		0	0	0	0	0	0	0	0
131		3	0	4	3	0	0	0	0
132		0	0	0	0	0	0	0	0
133		0	0	0	0	0	0	0	0
134		0	0	0	0	0	0	0	0
135		0	0	0	0	0	0	0	0
136		0	0	0	0	0	0	0	0
137		0	0	0	0	0	0	0	0
138		0	0	0	0	0	0	0	0
139	N/A	Company handles no grain or grain products							
140		0	0	0	0	0	0	0	0
141		0	0	0	0	0	0	0	0
142		0	0	0	0	0	0	0	0
143		0	0	0	0	0	0	0	0
144		0	0	0	0	0	0	0	0
145		0	0	0	0	0	0	0	0
146		0	0	0	0	0	0	0	0
147		1	0	2	0	0	0	0	0
148		0	0	0	0	0	0	0	1
149		0	0	0	0	0	0	0	0
150		1	0	0	1	0	0	0	0
151		0	0	0	0	0	0	0	0
152		1	0	0	0	0	0	0	0
153		0	0	0	0	0	0	0	0
154		0	0	0	0	0	0	0	0
155		0	0	0	0	0	0	0	0
156		0	0	0	1	0	0	0	0
157		0	0	0		0	0	0	0
158		5	0	0		0	0	0	0
159		0	0	0		0	0	0	0
160		0	0	0		0	0	0	0
161		0	0	0		0	0	0	0
162		0	0	0		0	0	0	0

Attachment 1

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
163		0	0	0	0	0	0	0	0
164		0	0	0	0	0	0	0	0
165		0	0	0	0	0	0	0	0
166		0	0	0	0	0	0	0	0
167		0	0	0	0	0	0	0	0
168		0	0	0	0	0	0	0	0
169		0	0	0	0	0	0	0	0
170		0	0	0	0	0	0	0	0
171		0	0	0	0	0	0	0	0
172		0	0	0	0	0	0	0	0
173		0	0	0	0	0	0	0	0
174		0	0	0	0	0	0	0	0
175		0	0	0	0	0	0	0	0
176		0	0	0	0	0	0	0	0
177		0	0	0	0	0	0	0	0
178	N/A	Company handles no grain or grain products							
179	N/A	Company handles no grain or grain products							
180		0	0	0	0	0	0	0	0
181		0	0	0	0	0	0	0	0
182		0	0	0	0	0	0	0	0
183	N/A	Company handles no grain or grain products							
184		0	0	0	1	0	0	0	0
185		0	0	0	0	0	0	0	0
186		0	0	0	0	0	0	0	0
187		0	0	0	0	0	0	0	0
188		0	0	0	0	0	0	0	0
189		0	0	0	0	0	0	0	0
190		0	0	0	1	0	0	0	0
191		0	0	0	0	0	0	0	0
192		1	0	0	0	0	0	0	0
193		0	0	0	0	0	0	0	0
194		0	0	0	0	0	0	0	0
195		0	0	0	0	0	0	0	0
196	N/A	Company handles no grain or grain products							
197		0	0	0	0	0	0	0	0
198		0	0	0	0	0	0	0	0
199		0	0	0	0	0	0	0	0
200		0	0	0	0	0	0	0	0
201		0	0	0	0	0	0	0	0
202		0	0	0	0	0	0	0	0
203		0	0	0	0	0	0	0	1
204		0	0	0	0	0	0	0	0
205		0	0	0	0	0	0	0	0
206		0	0	0	1	0	0	0	0
[illegible]		[illegible]	[illegible]	[illegible]	0	0	0	0	0

Attachment 1

COMPANY CODE	MILL YEARS	EXPLOSIONS	DEATHS	INJURIES	FIRES	DEATHS	INJURIES	BIN ENTRY DEATHS	OTHER DEATHS
208		0	0	0	0	0	0	0	0
209		0	0	0	0	0	0	0	0
210	N/A	Company handles no grain or grain products							
211		0	0	0	0	0	0	0	0
212		0	0	0	0	0	0	0	0
213		0	0	0	0	0	0	0	0
214		0	0	0	0	0	0	0	0
215		0	0	0	0	0	0	0	0
216	N/A	Company handles no grain or grain products							
217		0	0	0	0	0	0	0	0
218		0	0	0	0	0	0	0	0
219		0	0	0	0	0	0	0	0
220		0	0	0	0	0	0	0	0
221		0	0	0	0	0	0	0	0
222		0	0	0	0	0	0	0	0
223		0	0	0	0	0	0	0	0
224		0	0	0	1	0	0	0	0
225		0	0	0	0	0	0	0	0
226		0	0	0	1	0	0	0	0
227		0	0	0	0	0	0	0	0
228		0	0	0	0	0	0	0	0
229		0	0	0	0	0	0	0	0
230		0	0	0	1	0	0	0	0
231		0	0	0	0	0	0	0	0
232		0	0	0	0	0	0	0	1
233		0	0	0	1	0	0	0	0
234		0	0	0	0	0	0	0	0
235		0	0	0	0	0	0	0	0
236		0	0	0	0	0	0	0	0
237		0	0	0	0	0	0	0	0
TOTALS	3694	19	0	7	21	0	1	1	8

N/A: Proposed standard is not applicable to this company.

Death and Injury columns immediately to the right of the explosion column refer to deaths and injuries caused by explosions. Death and Injury columns immediately to the right of the Fire column refer to deaths and injuries caused by fires.

Attachment 2A

CAUSED BY
PROPERTY DAMAGE FEED MILL FIRES
BASED ON AFMA SURVEY DATA
TOTAL OF ALL INCIDENTS 1979-1983

Incident	Property Damage	Replacement Cost Factor	1982 Property Damage
A (1982)	385,000	1.00	385,000
B (1979)	3,451	1.20	4,141
C (1980)	40,000	1.12	44,800
D (1982)	200,000	1.00	200,000
E (1983)	10,000	1.00	10,000
F (1981)	12,000	1.06	12,720
G (1979)	20,000	1.20	24,000
H (1979)	20,000	1.20	36,000
I (1979)	93,000	1.20	111,600
J (1979)	21,000	1.20	25,200
K (1980)	10,826	1.12	12,125
L (1982)	29,872	1.00	29,872
M (1980)	32,000	1.12	38,400
N (1983)	27,000	1.00	27,000
O (1983)	35,000	1.00	35,000
P (1981)	11,220	1.06	11,893
Q (1981)	13,000	1.06	13,780

Total Property Damage for Fires in 1982 Dollars: 1,021,531

Average Property Damage in 1982 dollars/fire: 60,090

Source: A. D. Little report Appendix page E-17 for replacement cost factor; No property damage estimate was provided for four fires.

Attachment 2B

PROPERTY DAMAGE CAUSED BY FEED MILL EXPLOSIONS
BASED ON AFMA SURVEY DATA
TOTAL OF ALL INCIDENTS 1979-1983

Incident	Property Damage	Replacement Cost Factor	1982 Property Damage
A (1983)	none: explosion vented to outside		
B (1980)	25,000	1.12	28,000
C (1981)	1,000	1.06	1,060
D (1980)	1,500	1.12	1,680
E (1982)	500	1.00	500
F (1980)	2,000	1.12	2,240
G (1979)	2,000	1.20	2,400
H (1980)	152,219	1.20	182,662
I (1980)	150,000	1.20	180,000
J (1982)	12,351	1.00	12,351
K (1983)	10,000	1.00	10,000
L (1975)	12,000	1.59	19,080
		TOTAL:	838,515

Average Property Damage per Feed Mill Explosion in 1982 Dollars: 69,876

Source: A. D. Little Report Appendix page E-17 for replacement cost factor. No property damage estimate was provided for seven explosions.

Attachment 3

SURVEY METHODOLOGY

The questionnaire was distributed to all active (feed manufacturing) members of AFMA. EVERY FEED MANUFACTURER MEMBER OF THE ASSOCIATION RESPONDED. Those who did not respond by mail were called. AFMA members currently produce more than 70% of the primary livestock and poultry formula feed which is sold in the U.S.

The survey was initially distributed to a sample of 14 AFMA members on March 14, 1984. The purpose of this mailing was to test the questionnaire. After evaluating the returns from the first mailing, it was determined that appropriate responses were being received and that no changes to the questionnaire were needed.

Respondents to the survey were promised confidentiality. It has been the experience of AFMA that surveys offering confidentiality receive better response rates. The survey was sent to all (except the previously mentioned 14 companies) AFMA feed manufacturers on April 4, 1984.

On May 3, 1984, a second request for response to the questionnaire was sent to all companies that had not responded. Approximately 135 companies had responded as of May 3. During the month of May, telephone calls were placed to members that had not responded.

The second request and phone calls resulted in responses from a total of 192 companies by June 8, the deadline for the filing of comments. It was felt that further responses would add to the significance and reliability of the survey results.

During the remainder of June and the first three days of July, phone calls were placed to the remaining non-respondents. Responses from the feed manufacturers were taken over the phone. Many of these feed manufacturers had not responded due to the inapplicability of the standard to their operation -- they handled no grain (only premixes -- vitamins, minerals, medication, or only liquid feed). One member had recently gone out of business and, therefore, did not respond.

Attachment 4

AFMA Risk/Benefit Survey

for

OSHA's Proposed Standard for Grain Handling Facilities

Please complete the following survey relating to your feed mill facilities for the years 1979-1983. Feel free to call David Bossman or David Nelson at AFMA if you have any questions regarding this survey (telephone: 703/524-0810).

Please complete and return this survey by April 20th to:

David Bossman
AFMA
1701 N. Fort Myer Drive
Arlington, VA 22209

Please send us copies of your OSHA 200 forms for the years 1979-1983.

I. Who should AFMA contact should we have questions regarding your response to this survey?

Name: ______________________________

Company: ______________________________

Address: ______________________________

City/State ______________________________

Telephone ______________________________

II. Please list the number of feed plants that your company operated in the following years (to the nearest whole year).

1979 _____ 1980 _____ 1981 _____ 1982 _____ 1983 _____

Attachment 4

III. GRAIN DUST EXPLOSIONS

Did you have any grain dust explosions in your feed plant(s) during the five year period 1979-1983?

YES NO

If yes, how many? ________

Please describe each one below. Make additional copies of this page if you had more than one.

1. a. Date: ________
   b. Location: city ________ state ________
   c. Number of employees injured (hospitalized or lost time accident) ________
      1. Description of injury(ies): ________
         ____
         ____
         ____
      2. Days away from work resulting from injury(ies): ________
   d. Number of employees killed: ________
   e. Estimated property damage: ________
   f. Location of explosion within mill? ________
   g. What was the cause of the explosion? ________
      ____
      ____
   h. Who determined the cause? (e.g. insurance co., fire dept.)
      ____

Attachment 4

IV. MAJOR FIRES

Did you have any major fires (over $10,000 in property damage) during the five year period 1979-1983?

YES NO

If yes, how many? ________

Please describe each one below. Make additional copies of this page if you had more than one.

1. a. Date: ______________________________
   b. Location: city ______________________ state __________
   c. Number of employees injured (hospitalized or lost time accident) ______________________________
      1. Description of injury(ies): ______________________________
         ____
      2. Days away from work resulting from injury(ies): _____
   d. Number of employees killed: ______________________________
   e. Estimated property damage: ______________________________
   f. Location of fire within mill?______________________________
   g. Is the cause of the fire known? If yes, what was it? ____
      ____
      ____
      ____
      ____
   h. Who determined the cause? (e.g. insurance co., fire dept.)
      ____

Attachment 4

V. BIN ENTRY DEATHS OR PERMANENTLY DISABLING INJURIES

Did you have any bin entry related accidents in your feed plant(s) during the five year period 1979-1983 which resulted in deaths or permanently disabling injuries?

YES NO

If yes, how many? __________

Please describe each one below. Make additional copies of this page if you had more than three.

1. a. Description of the injury: ____________________

____

b. Days away from work resulting from injury: __________

c. Cause of injury: ____________________

____

____

d. Number died: ____________________

2. a. Description of the injury: ____________________

____

b. Days away from work resulting from injury: __________

c. Cause of injury: ____________________

____

____

d. ______________________________

3. a. Description of the injury: ____________________

____

b. Days away from work resulting from injury: __________

c. Cause of injury: ____________________

____

____

d. Number died: ____________________

Attachment 4

VI. OTHER DEATHS OR PERMANENTLY DISABLING INJURIES

Did you have any accidents in your feed plant(s) during the five year period 1979-1983 which resulted in deaths or injuries in addition to the ones which you have listed on the preceding pages?

YES NO

If yes, how many? ________

Please describe each one below. Make additional copies of this page if you had more than three.

1. a. Description of the injury: ________

____

b. Days away from work resulting from injury: ________

c. Cause of injury: ________

____

____

d. Number died: ________

2. a. Description of the injury: ________

____

b. Days away from work resulting from injury: ________

c. Cause of injury: ________

____

____

d. Number died: ________

3. a. Description of the injury: ________

____

b. Days away from work resulting from injury: ________

c. Cause of injury: ________

____

____

d. Number died: ________

AFMA

June 8, 1984

Docket Officer
Docket H-117
U.S. Department of Labor
Occupational Safety and Health
Administration
Room S-2612
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Proposed Standard for Grain Handling Facilities (29 C.F.R. Parts 1910 and 1917)

Dear Sir:

The American Feed Manufacturers Association (AFMA) submits the following comment in opposition to including feed manufacturing facilities and activities (hereinafter "feed mills") within the scope and application of the proposed Grain Handling Facilities Standard, 49 Fed. Reg. 996 (January 6, 1984). AFMA believes the OSHA proposal is directed primarily at bulk raw grain handling facilities engaged extensively in merchandising grains, not at process operations such as feed manufacturing. Because of fundamental differences between feed manufacturing facilities and activities and those of large, high throughput, grain elevators, and their consequences to employee safety, AFMA believes feed mills should not he covered by the proposed standard.

AFMA is the national trade association of livestock and poultry feed manufacturers. AFMA's members represent over 70% of

AMERICAN FEED MANUFACTURERS ASSOCIATION, INC. • 1701 N. FT. MYER DRIVE • ARLINGTON, VA 22209 • TELE. 703 / 524-0810

the primary formula feed sold in the United States. The feed manufacturing industry, through AFMA, has had a long commitment to employee safety. AFMA has developed a comprehensive safety program for feed manufacturers which includes a monthly article called SAFETYGRAM. The AFMA SAFETYGRAM is a well-known and well-respected employee safety training program used by managers in hundreds of feed mills throughout the country to train literally thousands of employees in safety practices. The AFMA Safety Committee, composed of safety experts from a wide range of feed companies, has taken a leadership role in developing voluntary safety programs for the feed manufacturing industry and establishing guidelines for feed mills to ensure employee safety. AFMA has sponsored literally hundreds of industry safety training programs and seminars and makes available to its members slide/tape and film versions of many of these programs. Just recently, in 1982, the AFMA Safety Committee initiated the Feed Industry Safety Award Program honoring those plants which have achieved an outstanding safety record.

Since the mid-1970's, the AFMA Safety Committee has focused considerable attention and resources on the problems addressed in OSHA's proposed Grain Handling Facilities Standard -- grain dust related explosions/fires and deaths attributable to bin entry. AFMA believes that its programs, in conjunction with heightened industry awareness and better employer/employee cooperation, have led to improved safety records by feed manufacturers.

AFMA believes the available data does not support the need for feed mills, large or small, to be included in the scope and application of the proposed Grain Handling Facilities Standard. The explosion and fire data which does exist, including OSHA data, establishes that feed mills do, in fact, have the BEST SAFETY RECORD of all segments of the grain handling industry. See 49 *Fed. Reg.* 1004-5 (Tables 1 and 2). The feed industry acknowledges that there have been isolated fires and explosions. However, the incidents and corresponding deaths/injuries have been relatively rare in the feed manufacturing industry. These few incidents clearly do not justify the enormous cost of the proposed OSHA standard.

AFMA believes that all feed mills should be *excluded* from the scope and application of the proposed regulation in the same manner and for the same reasons as the seed industry, which was expressly excluded by OSHA in the preamble to the regulation. 49 *Fed. Reg.* 998. Recently, the Office of Management and Budget, based on a comprehensive review of the OSHA proposal and all supporting data, provided additional support for excluding feed manufacturers. In its April 11, 1984 letter (OSHA Docket Entry #14-104), OMB concluded:

> Whatever the merits of the proposed standards for large and high throughput grain handling facilities, the available evidence suggests they would be *inappropriate for storage facilities such as feed mills* and country elevators. (Emphasis supplied).

AFMA's comment will *not* address the merits or the appropriateness of the proposal as it pertains to other segments of the grain handling industry. In addition, because AFMA believes feed manufacturing facilities and activities should be *excluded* from the scope of the rule, these comments will not address specific provisions of the proposal. These comments will clearly show that there is a lack of evidence to support inclusion of feed mills in the proposed standard.

In a study entitled "An Economic Impact Study of the Proposed OSHA Grain Handling Facilities Standard of the Feed Manufacturing Industry," the independent consulting firm of T. E. Stivers of Decatur, Georgia calculated that the feed manufacturing industry will be faced with an initial/first year cost of over $480 million to comply with the proposal. This conservative estimate is based upon a comprehensive review of a cross section of feed manufacturing facilities (20 mills visited) by a group of professionals with the knowledge and experience to accurately determine the cost of compliance. Stivers estimates the recurring annual cost could be $300 million. This enormous cost can in no way be justified by the highly speculative, "potential" benefits which OSHA claims would be derived from applying this rule to feed manufacturing facilities and activities.

OSHA's "benefits" are based on extraordinarily high and unsupported "effectiveness" projections which range from 50%-100%. Utilizing realistic effectiveness projections demonstrates the proposed rule, as applied to feed mills, would involve few, if any, benefits to the industry or its employees. AFMA is in the process of reviewing the claimed benefits and will be submitting its report later during the rulemaking.

I. THE PROPOSED OSHA STANDARD SHOULD NOT APPLY TO FEED MANUFACTURING ACTIVITIES AND FACILITIES

A. Purpose of the OSHA Rule

The proposed rule is OSHA's response to the occurrence in 1977-78 of several grain dust explosions. These grain elevator explosions focused the attention of industry, labor, and numerous government agencies on employee safety in the grain handling industries. The laudable purpose of the proposed rule is to reduce the incidence of explosions and fires in the grain handling industry and thereby reduce the deaths and injuries associated with those incidents.

There is no question but that the purpose of the rule is noble. Unfortunately, OSHA has erred in attempting to include within the scope of the rule all activities which fall within the scope of "grain handling."

The need for a standard is not the same for all segments of the grain handling industry. Explosion/fire rates vary considerably from segment-to-segment within the grain handling industries. See 49 Fed. Reg. 1004-5 (Tables 1 and 2). Similarly, the safety record (death/injury rates) varies considerably segment-by-segment. According to OSHA, the feed manufacturing industry has had the lowest death and injury rate from fires and explosions of any of the recognized segments in the grain handling industry. 49 Fed. Reg. 1004-5. For this reason, AFMA believes it is totally inappropriate for OSHA, without compelling and specific justification, to include all segments of the grain handling industry in the same standard.

B. OSHA Cites No Basis for Including Feed Mills in the Standard

While recognizing that there are fundamental differences between the various segments of the grain handling industry, OSHA makes no attempt at justifying its decision to include all of these diverse facilities and activities in one standard. As support for its proposal, OSHA states:

> . . . There is now sufficient data and information upon which a reasonable standard can be based to mitigate fire, explosion, and certain other known safety hazards associated with grain handling facilities. . . . Employees in the grain handling industry are exposed to safety hazards associated with fires and explosions, as well as those associated with confined spaces and repair and maintenance of mechanical systems. . . . These reports clearly show that there is a significant risk to employees in this industry. . . . 49 Fed. Reg. 998.

This broad brush approach does not justify treating all grain handling facilities in the same manner or including all segments of the grain handling industry within the scope of the standard.

OSHA's sole support for including feed mills in the proposal is a reference to the National Academy of Sciences' Report entitled "Prevention of Grain Elevator and Mill Explosions," in which NAS concludes:

> Mills of any type (feed, flour, soy, rice, etc.) are subject to the same dust explosion hazards as grain elevators since their input is grain and, before processing, it is handled in the same manner as in elevators. . . . Pg. 123.

Unfortunately, this conclusion totally fails to focus on the vast differences in facility design and activity between feed manufacturers and large, high throughput, grain elevators.

C. Feed Manufacturing Facilities and Activities are Distinguishable from Others in the Grain Handling Industry

There are basic operational differences between feed mills and grain elevators. The feed manufacturing facility typically operates at a much slower speed and has a smaller capacity than a grain elevator. Feed mills generally run year round with little seasonal change that can cause stress to the equipment. A feed mill which produces over 50,000 tons of product a year is considered a large mill. A 50,000 ton a year capacity would equate to less than a 2 million bushel annual throughput. OSHA defines an elevator as small where it has less than a 4 million bushel annual throughput. Proposed 1910.272(c)(10).

Feed mills typically use a myriad of ingredients, most of which are less explosive than grain dust. Some of the ingredients are inert fire retardants such as limestone and bentonite. Other non-explosive and non-flammable ingredients include salt, dicalcium-phosphate, monocalcium-phosphate, and silica. Feed mills also use a large number of non-flammable liquid ingredients such as molasses, mineral oil, and water soluble ingredients which further reduce the explodability or flammability of the grain and its dust generation potential. The pelleting process commonly used in feed manufacturing necessitates the inclusion of steam or water to the ingredients, further reducing the risk of explosion or fire. The cooling process after pelleting requires large volumes of air resulting in good ventilation and air movement throughout the mill, which tends to reduce the concentration of dust and therefore the potential risk of explosion.

Raw bulk grain is only a small part of the total ingredient mix used in a feed mill. Soybean meal, animal byproducts such as tankage, or meat and bone meal, dehydrated alfalfa, corn gluten meal, beet pulp, and sugar are just a few of the many major ingredients used to produce livestock and poultry feed. All of these ingredients are basically non-explosive and non-flammable.

The same ingredient system is used to receive each of the many components of a formulated feed. The inherent nature of these ingredients makes them much less hazardous from an explodability/flammability standpoint than raw bulk grain. Even ground grain such as corn or wheat is less explosive than the whole grain which has typically been the source of problems in grain elevator explosions.

The feed industry is very aware of the potential risks and is consistently upgrading existing facilities and modernizing new ones to reduce such hazards. For example, several years ago it was determined that electrical wiring and equipment were a potential source of ignition for fires and explosions. Accordingly, in the past several years, thousands of motors have been replaced in accordance with the requirements of the National Fire Protection Association's National Electrical Code. This has cost the feed manufacturing industry millions of dollars to switch to totally enclosed (dust-tight), fan-cooled motors, in classified locations; however, in this instance the feed industry generally concurred that the need for the change was justified. As another example, new construction of feed mills shows an increased use of pneumatic systems, ventilation systems, smooth side wall bin design, and the increased automation of product flow and processing. Enclosing processing equipment, using dust-tight conveyors and electrical equipment, and installing bins and equipment with minimal ledges or areas where dust can accumulate are all ways the industry is responding to the need to reduce the risk of fires, explosions, and bin suffocation.

The feed manufacturing industry is already heavily regulated by the Food and Drug Administration (FDA). The FDA requires feed manufacturers to scrupulously follow good manufacturing practices (GMPs) in producing medicated animal feed. See 21 C.F.R. Part 225. The GMP regulations require feed manufacturers to maintain a clean facility and to produce feed which has no carry over or contamination from one product to another. Accordingly, feed manufacturing equipment must be kept clean to avoid carry over residues. FDA regulations and inspection, coupled with industry efforts and advancements, provides further support for excluding feed mills from this standard.

D. Feed Mills are Safer Than Other Facilities in the Grain Handling Industry

The documented record clearly demonstrates that the explosion potential is many times less in a feed mill than in all other segments of the grain handling industry with the possible exception of small country elevators. Feed mills have the lowest fire and explosion incident rate, as well as the lowest death/injury rate in all of the industry segments OSHA seeks to regulate in this proposal. Even OSHA estimates, which are the basis for Tables A, B, and C which follow, demonstrate a much safer environment in feed mills. Certainly, the wide discrepancy between these incident rates indicates not only the clear justification to exclude feed mills from the standard, but also the inappropriateness of including all segments of the grain handling industry in this one standard.

In connection with this rulemaking, AFMA surveyed its membership requesting data regarding the number of explosions and fires and associated deaths/injuries which have occurred over the past five years. Approximately 80% of AFMA members responded to the questionnaire. The results from this survey further establish that it would be inappropriate to include feed mills in the proposed standard. The AFMA survey shows that in the last five years (1979-1983), AFMA members experienced 18 explosions with no fatalities and 19 fires with no fatalities. In the feed industry, the vast majority of fires and explosions do not result in employee deaths and frequently do not involve injuries.

The explosion/fire data utilized by OSHA is flawed. Many of the fires, explosions and deaths/injuries attributable to the feed industry in the OSHA data were improperly categorized and/or not verified. Moreover, the vast majority of explosions/fires identified in the OSHA data have no known causes. Where a cause was identified, many of the incidents would not have been prevented by compliance with the proposed standard.

Based upon a careful analysis of the benefits purported by OSHA, AFMA believes that the OSHA estimate of baseline risks and benefits is over-stated. In determining baseline risks, OSHA repeatedly included misclassified or unverified incidents as being in feed mills. Moreover, OSHA's projected effectiveness rates, between 50%-100%, have absolutely no basis in fact or history.

TABLE A
FACILITY SUSCEPTIBILITY TO EXPLOSION

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	# OF EXPLOSIONS/YEAR	PROBABILITY OF AN EXPLOSION OCCURRING IN A FACILITY(B/A)	INDUSTRY SUSCEPTIBILITY TO EXPLOSIONS/FEED INDUSTRY SUSCEPTIBILITY
Grain Elevators	11,200	16.4	.0015	1.25
Country	10,415	7.7	.0007	.58
Inland	460	6.4	.0139	11.58
Terminal	325	2.3	.0071	5.91
Feed Mills	4,070	4.7	.0012	----
Other Processing	894	4.6	.0051	4.25

Source: OSHA Regulatory Impact Analysis, 49 FR 1004, 1005.

FACILITY SUSCEPTIBILITY TO FIRES

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	# OF FIRES/YEAR	PROBABILITY OF A FIRE OCCURRING IN A FACILITY(B/A)	INDUSTRY SUSCEPTIBILITY TO FIRES/FEED INDUSTRY SUSCEPTIBILITY
Grain Elevators	11,200	1391	.1242	3.91
Country	10,415	1100	.1056	5.33
Inland	460	194	.4217	13.30
Terminal	325	97	.2985	9.41
Feed Mills	4,070	129	.0317	----
Other Processing	894	679	.7595	23.96

Source: OSHA Regulatory Impact Analysis, 49 FR 1004, 1005.

TABLE B
DEATH AND INJURY DATA FROM EXPLOSIONS IN A GRAIN HANDLING FACILITY BY INDUSTRY SEGMENT

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	DEATHS/ YEAR	DEATH PROBABILITY IN A FACILITY (A/B)	INDUSTRY DEATH PROBABILITY/ FEED INDUSTRY PROBABILITY
Grain Elevators	11,200	15.7	.0014	4.66
Country	10,415	1.1	.0001	.33
Inland	460	1.3	.0028	9.33
Terminal	325	13.3	.0409	136.33
Feed Mills	4,070	1.3	.0003	----
Other Processing	894	1.7	.0019	6.33

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	INJURIES/ YEAR	INJURY PROBABILITY IN A FACILITY (B/A)	INDUSTRY INJURY PROBABILITY/ FEED INDUSTRY PROBABILITY
Grain Elevators	11,200	30.3	.0027	1.35
Country	10,415	7.6	.0007	.35
Inland	460	7.6	.0165	8.25
Terminal	325	15.1	.0465	23.25
Feed Mills	4,070	8.1	.0020	----
Other Processing	894	15.6	.0174	8.70

Source: OSHA Regulatory Impact Analysis, 49 FR 1004, 1005.

TABLE C
DEATH AND INJURY DATA FROM FIRES IN A GRAIN HANDLING FACILITY BY INDUSTRY SEGMENT

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	DEATHS/ YEAR	DEATH PROBABILITY IN A FACILITY (B/A)	INDUSTRY DEATH PROBABILITY/ FEED INDUSTRY PROBABILITY
Grain Elevators	11,200	3.0	.0003	4.05
Country	10,415	2.3	.000221	2.98
Inland	460	.5	.0011	14.86
Terminal	325	.2	.0006	8.12
Feed Mills	4,070	.3	.000074	----
Other Processing	894	1.5	.0017	22.97

	A	B		
INDUSTRY SEGMENT	# OF FACILITIES	INJURIES/ YEAR	INJURY PROBABILITY IN A FACILITY (B/A)	INDUSTRY INJURY PROBABILITY/ FEED INDUSTRY PROBABILITY
Grain Elevators	11,200	567.5	.0507	4.38
Country	10,415	448.8	.0431	3.32
Inland	460	79.2	.1722	13.25
Terminal	325	39.5	.1215	9.35
Feed Mills	4,070	52.8	.0130	----
Other Processing	894	276.2	.3089	23.76

Source: OSHA Regulatory Impact Analysis, 49 FR 1004, 1005.

II. OSHA'S COST ANALYSIS UNDERSTATES THE ACTUAL COST OF COMPLIANCE

The cost analysis put forth by OSHA reflects a lack of understanding on the part of the Agency and its two outside consultants, Arthur D. Little (ADL) and Booz-Allen & Hamilton (BAH), regarding the compliance costs associated with the proposed standard. The A.D. Little Study was based on a survey of 18 grain handling facilities. It is impossible to develop an accurate cost estimate for all grain handling facilities in all grain handling industries based upon an 18 establishment survey. Only two feed mills were included in the A.D. Little survey; Booz-Allen & Hamilton did not conduct an independent facility study. The proposed standard affects literally thousands of facilities across the country which are of a multitude of sizes, ages, and fit into the various different segments of the grain handling industry. The costs will differ for large feed mills and small feed mills, new feed mills and old feed mills, and feed mills generally versus country elevators, versus terminal elevators or other grain processing facilities. The suggestion by OSHA that an 18 establishment sample can be representative of all the grain handling industries further establishes the lack of understanding by OSHA of the myriad differences among and within the various segments of the grain handling industry.

Not only is the OSHA cost analysis deficient for its failure to differentiate among the various segments of the grain handling industry, but it also contains serious inaccuracies regarding the compliance costs of particular provisions of the proposal. For example, Booz-Allen & Hamilton in estimating the cost of the emergency action plan assumes that horns will not be necessary in small feed mills to comply with the proposal.[1] The work stations in small feed mills are very similar to work stations in large feed mills in that the ambient noise levels attributable to a grinder or cooler or a pellet mill or bagger are similar. Therefore, compliance with proposed Section 1910.165 would necessitate a horn in both large and small feed mills. A.D. Little and Booz-Allen & Hamilton estimate that an electric air horn can be installed for approximately $300.00. However, OSHA's consultants failed to consider that the horn must be installed according to OSHA Subpart S or the National Electrical Code which requires dust-tight fixtures and conduit. The cost of the conduit and installation increases significantly for both large and small feed mills because of these requirements. OSHA has underestimated the cost of installing the alarm system in a feed mill. The T. E. Stivers organization, based on a review of a cross section of feed mills, estimated the average cost of installing an alarm system to be $9,240. See Stivers' Report, pp. 3-4.

The training requirements set forth in the proposal are quite explicit. However, OSHA estimates that the preparation for the training can be completed in five hours and the training itself take only two hours. These time estimates are much too low. Stivers estimates the initial first year cost, per feed mill of complying with the training requirements to be $3,714. See Stivers' Report at pp. 1-4.

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[1] Booz-Allen & Hamilton Report, April 1984, page I-13.

OSHA estimates an average cost of $150.00 for a new grate overlay to comply with the 2 1/2 inch by 2 1/2 inch square requirement. Unfortunately, a $150.00 grate would be totally inadequate to withstand the truck traffic it would be required to sustain. Thus, in all likelihood, feed mills would be forced to use a magnet system, in lieu of the grate, on the incoming commodity stream. Stivers estimates the magnet cost per facility per year to be $1,575. See Stivers' Report, pp. 1-4.

Finally, OSHA's estimates of $66.00 initial and $18.00 recurring for the cost of the maintenance program are simply too low. The additional administrative and employee time required to implement the program would be at least 20 times higher than that estimated by OSHA. Compliance with this provision would require regularly scheduled inspections, lubrication, and other preventative procedures, corrective measures, recordkeeping, and lock-out/tag-out procedures. Stivers estimates a cost of $15,589 per year per facility. See Stivers' Report, pp. 1-4.

AFMA believes that OSHA has failed in its responsibility to prepare an honest and realistic economic impact analysis for the proposed standard. OSHA has also failed in developing an analysis required by the Regulatory Flexibility Act of 1980 -- Impact on Small Business.

In order to assess the true cost on the feed manufacturing industry of the OSHA proposal, AFMA retained the independent consulting firm of T. E. Stivers, Inc. of Decatur, Georgia to prepare an analysis. Stivers visited and inspected 20 feed manufacturing facilities of all sizes, ages, and designs, and conservatively determined that initial/first year cost of the proposed standard for the feed manufacturing would be $489,240,000. Annual compliance costs for subsequent years would be approximately $300 million. Copies of the full report are submitted with these comments.

III. OSHA'S RISK/BENEFIT ANALYSIS OVERSTATES THE ACTUAL/POTENTIAL RISKS AND BENEFITS

OSHA's estimate of the explosion/fire risk faced by feed industry employees, as well as the expected benefits to be derived from implementation of the proposed standard, are flawed for the following principal reasons: (1) OSHA's baseline risk estimates for the feed industry (explosion/fire incidents and resulting deaths/injuries) are based on inaccurate and misrepresented information. Critical review of OSHA's sources results in much lower baseline data; (2) OSHA's efficiency projections (50%-100%) far exceed any documented experience in history with the results which can be achieved from the implementation of an OSHA standard. More realistic effectiveness projections result in much lower benefit estimates.

OSHA estimates the baseline risks in feed mills to be:

1) 4.7 explosions per year accounting for 1.3 deaths and 8.1 injuries.

2) 129 reported fires per year accounting for .3 deaths and 52.8 injuries.

3) 3.7 bin suffocation deaths, 6.5 other deaths, and 127.7 other injuries. See 49 Fed. Reg. 1004-5 (Tables 1 and 2).

If fully implemented, OSHA estimates that the proposal will save 6.3 lives and prevent 61.8 injuries per year -- an effectiveness rate of approximately 70% with respect to explosions and fires and 50% with respect to other deaths in the feed industry.

AFMA believes that the risk/benefit analysis performed by Arthur D. Little and Booz-Allen & Hamilton severely overstate the risks and benefits of this proposal to the feed manufacturing industry. Specifically, in examining the ADL and BAH sources, many discrepancies, both in the data base and in the methodology used to extrapolate the data, become evident.

OSHA estimated that there are 4,070 feed mills in the United States. The source for this estimate is the 1977 Census of Manufacturers. However, using data from the Food and Drug Administration which regulates the use of animal drugs in feed, and estimates gathered by the United States Department of Agriculture's Agricultural Stabilization and Conservation Service, very different numbers result. Both of these sources estimate approximately 9,000 feed mills in the United States.[2] This figure is consistent with estimates compiled by AFMA, the industry trade association.

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[2] Based on conversations with Dr. George Graber, Division Director for Animal Feeds, Surveillance and Compliance Division, Bureau of Veterinary Medicine, Food and Drug Administration (May 4, 1984) and Mr. Harold Gay, Supervisory Emergency Preparedness Specialist, Agricultural Stabilization and Conservation Service, U.S. Department of Agriculture (April 30 and May 4, 1984).

A primary source of all risk/benefit work performed in relation to the question of grain dust explosions is the USDA Task Force publication "Prevention of Dust Explosions in Grain Elevators -- An Achievable Goal," published in 1979. According to this USDA report, there were 250 explosions from 1958 to 1978 in grain handling facilities. Of these explosions, 82 were attributable to "feed mills." However, in examining USDA's files, several additional facts become evident. First, the USDA Task Force labeled as "feed mills" any grain handling facility which was not a grain elevator. Thus, the "feed mill" category included wet corn milling facilities, soybean processing facilities, flour mills, cereal mills, and pet food processing plants. In all, 16 of the 82 facilities were improperly labeled "feed mills." Second, the USDA files showed that the researchers were unable to verify 14 of the incidents identified as "feed mill" explosions. Third, many of these explosions were not grain dust explosions, but rather were attributable to propane gas, steam boilers, or office fire explosions -- all incidents which could not be prevented by the proposed standard. Eliminating those incidents which were improperly categorized or did not involve a grain dust explosion, reduces the total number of feed mill explosions to 47 from 1958 to 1978, little more than half the number reported by USDA. Thus, OSHA's reliance on the USDA Task Force Report for feed mill baseline figures overstates the actual incidents and correspondingly the number of deaths/injuries.

OSHA's reliance on recent explosion data compiled by USDA's Federal Grain Inspection Service (FGIS), likewise does not support the baseline risk figures presented in the proposal. Examination of the FGIS files reveals that many of the alleged explosion incidents remain unverified; others did not involve grain dust explosions. Moreover, FGIS failed to classify the facility by type -- e.g., elevator, feed mill, flour mill. For most of the explosions recorded by FGIS, the only information is the name of the facility and the date the incident allegedly occurred. When FGIS lists were checked against the ASCS listing of feed mills to determine which facilities were actually feed mills and when the unverified incidents and non-grain dust incidents were eliminated, it was determined that .0008 of all feed mills will experience an explosion per year. This baseline risk figure, calculated on the basis of 9,000 feed mills, is approximately 1/3 less than that purported by OSHA.

OSHA's baseline fire incident data are similarly flawed. OSHA's source is the National Fire Protection Association (NFPA), which until 1975 attempted to estimate the number of fire incidents in grain elevators. (Not feed mills). In 1975, NFPA estimated there were 2,200 fires in grain elevators. The NFPA discontinued its estimate program in 1975 due to a lack of confidence in the extrapolation method, concluding its estimates were probably overstated.

Estimates of major fires in the feed industry are almost impossible to make due to inadequate data. Reviewing the files of the National Fire Protection Association, the same source utilized by OSHA, reveals that there were only 10 major fires in feed mills from 1971 to the present -- only 3 of which would be potentially preventable by the standard.

OSHA claims the major portion of the benefits to the industry from the proposed standard to be attributable to a reduction in property damage and business interruption.[3] Even if these estimates were true, they are not properly within the scope of OSHA's authority. OSHA's purpose is to safeguard the health and safety of the nation's employees, not to "assist" industry in reducing property damage and business interruption expenses. Moreover, the numbers used by OSHA for property damage and business interruption were developed from an extremely small sample of incidents contained in the NFPA files. For example, according to an ADL review of the NFPA files, the average property damage per explosion is $1.7 million.[4] This estimate seems incredibly high, particularly with respect to feed mills, since the average value of a feed mill and its contents is approximately $875,000.[5] The business interruption figures are equally skewed.

In order to assess the accuracy of OSHA's risk/benefit analyses, AFMA undertook a comprehensive review of all of the sources relied upon by OSHA. This included a complete review of the A.D. Little and Booz-Allen & Hamilton studies, the files developed by the U.S. Department of Agriculture's Task Force for the 1958-1978 period, FGIS files containing more recent data, and NFPA fire incident data. AFMA intends to file this analysis after it is completed, later in the rulemaking process. In sum, OSHA's estimates of explosion/fire risks and the corresponding deaths/injuries overstate the actual experience in the feed industry.

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[3] Booz-Allen & Hamilton Report, Exhibit II-44.

[4] Arthur D. Little Report, page V-27, Table V-10.

[5] U.S. Department of Commerce Annual Survey of Manufacturers, M81(AS)-4, page 6, Table 2.

Finally, OSHA's effectiveness estimates are also much too high. OSHA argues that implementation of the proposal will reduce explosions and fires and the corresponding deaths/injuries by between 50%-70%. In stark contrast, leading commentors and researchers studying the impact of OSHA standards generally estimate an effectiveness rate of between 1%-10%. AFMA made a thorough search of the available data on the effectiveness of OSHA standards in preventing identifiable hazards. The process included a computerized search through OSHA's Technical Data Center, doctoral dissertations at the Data Center, a review of indexes of recent economic journals, and computerized searches of the Library of Congress and General Accounting Office data bases. This search found no evidence of OSHA reducing deaths and injuries through standard setting of greater than 10%.

IV. IT IS NEITHER "REASONABLY NECESSARY" NOR "APPROPRIATE" TO APPLY OSHA'S PROPOSED GRAIN HANDLING STANDARD TO FEED MANUFACTURING FACILITIES AND ACTIVITIES

Section 3(8) of the Occupational Safety and Health Act authorizes OSHA to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment in places of employment." 29 U.S.C. Section 652(8). The courts have long held that if a proposed standard does not fit within this definition, it is not one the Secretary is authorized to adopt. See *Texas Independent Ginners Association v. Marshall*, 630 F.2d 398 (5th Cir. 1980). Recently, the U.S. Supreme Court ruled that a standard must be "reasonably necessary and appropriate to remedy a significant risk of material health impairment. . ." *American Petroleum Institute v. OSHA*, 448 U.S. at 639, 641, 644. In addition, the standard must be at least "reasonably efficacious" in reducing a "significant risk" of material harm. In this regard, the standard must be economically and technologically feasible; the benefits must bear a reasonable relationship to cost; the standard must adopt the least burdensome technique to achieve the benefit; the standard must not threaten the viability of the industry or a part of the industry.

Since there is insufficient evidence to document a serious risk to feed manufacturing employees attributable to grain dust explosions/fires, there is no basis for OSHA to proceed with the proposed rule as it applies to feed manufacturing facilities and activities. Moreover, because the compliance costs of the proposed rule will greatly outweigh any corresponding benefits, it would be inappropriate for OSHA to adopt a final rule applying these standards to feed manufacturers.

V. CONCLUSION

For the foregoing reasons, AFMA urges OSHA to remove feed manufacturing facilities and activities from the scope and coverage of the proposed rule.

Respectfully submitted,

Terry R. Stonecipher
Terry W. Stonecipher
Chairman, AFMA Safety Committee

David A. Bossman
Vice President
American Feed Manufacturers
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U.S. Department of Labor

Occupational Safety and Health Administration

In the Matter of:	)	
Grain Handling	)	Docket No. 117

Post-Hearing Brief
Submitted by The
American Feed Manufacturers Association
to the
Occupational Safety and Health Administration
in Response to The
Proposed Grain Handling Facilities Regulation
29 C.F.R. Parts 1910 and 1917
49 Fed. Reg. 996 (January 6, 1984)

Submitted: November 26, 1984

American Feed Manufacturers Association
Post-Hearing Brief

I. SUMMARY

This Post-Hearing Brief is submitted by the American Feed Manufacturers Association (AFMA) in support of the position that OSHA lacks an adequate basis for including feed manufacturing facilities and activities (hereinafter "feed mills") within the scope and application of a final Grain Handling Facility Standard as proposed in the January 6, 1984 Federal Register, 49 Fed. Reg. 996. Based upon its comprehensive review of the entire rulemaking record, including all the comments and testimony, as well as data submitted by OSHA, AFMA continues to believe that OSHA has not demonstrated a significant risk to feed mill employees caused by fires and explosions. AFMA also believes the cost to comply with the proposed regulation is far in excess of any foreseeable employee safety benefit.

In its January 6th proposal, OSHA conceded that it possessed only "limited information regarding the risks and benefits the proposed rule would have for feed mills." 49 Fed. Reg. 999. AFMA believes that the record before OSHA clearly establishes that fundamental differences do exist between feed manufacturing facilities and the other industries included within the scope of the proposal. Thus, based upon the record of this proceeding, the proposed rule should not apply to feed manufacturing activities. There has been no new evidence submitted by OSHA or others to the record since January 6th which would justify the inclusion of feed mills in this comprehensive and costly regulation.

If implemented and enforced, the proposed regulation would be the most costly regulation in the history of the feed manufacturing industry.

II. INTRODUCTION

AFMA is the national trade association of livestock and poultry feed manufacturers. AFMA's members represent more than 70% of the primary formula feed sold in the United States. The feed manufacturing industry, through AFMA, has had a long commitment to employee safety. Since the mid-1970's, the AFMA Safety Committee has focused considerable attention and resources on the problems addressed in OSHA's proposed standard for grain handling facilities -- grain dust related explosions/fires and deaths attributable to bin entry. AFMA believes that its programs, in conjunction with heightened industry awareness and better employer/employee cooperation, have led to improved safety records by all feed manufacturers.

AFMA's opposition to the broad scope of OSHA's proposed Grain Handling Facility Standard is based primarily on two factors. First, the construction and operation of feed manufacturing facilities differ substantially from those of large, high throughput, grain elevators. Due to the smaller capacity, slower speed, and different ingredients handled by feed mills, it is inappropriate for OSHA to promulgate one standard to apply to all operations which fall within the proposed definition of "grain handling facilities." Second, the explosion and fire data which does exist, including OSHA and AFMA data, clearly establishes that feed mills have an excellent safety record and have the BEST SAFETY RECORD of all grain handling industries. See AFMA Post-Hearing Data (Membership Survey and Risk Benefit Analysis); See also, 49 Fed. Reg. 1004-5 (Tables I and II). The few isolated feed mill incidents do not justify the enormous cost of the proposed OSHA standard.

AFMA continues to believe, based upon all of the evidence in the record, that feed mills should be excluded from the scope and application of the proposed regulation in the same manner and for the same reasons as the seed industry, which was expressly excluded by OSHA in the preamble to the proposed rule. 49 Fed. Reg. 998.

Data submitted by AFMA and others during the rulemaking clearly establishes that feed mills should be excluded from the scope and application of the proposed Grain Handling Facility Standard. This data includes, but is not limited to, the following:

A. AFMA's membership survey of fires/explosions in feed manufacturing facilities -- The survey results, which have been submitted to OSHA, demonstrate that there were no fatalities and only 7 injuries as the result of explosions and no fatalities and only 1 injury as the result of fires in feed mills operated by AFMA members in the last five years. The survey results also show that there was only 1 death due to a bin entry accident.

B. An Economic Impact Study of the proposed Grain Handling Facility Standard on the feed manufacturing industry prepared by the T.E. Stivers Organization, Inc., Decatur, Georgia -- The T.E. Stivers Organization found that the first year costs of compliance with the OSHA proposal for the 9,000 feed mills in the United States would be $490,690,000.

C. AFMA Risk/Benefit Analysis to the feed manufacturing industry of OSHA's proposed standard for grain handling facilities -- The Risk/Benefit Analysis clearly shows that A.D. Little and Booz-Allen & Hamilton grossly overstated the risks to feed mill employees. In addition, AFMA found that A.D. Little and Booz-Allen & Hamilton assigned unsupported and unrealisitically high effectiveness values to the proposed standard, thereby deriving greatly exaggerated benefit data.

Based upon all the evidence in the record, AFMA opposes inclusion of feed mills within the scope of the proposed rule. AFMA believes the record is totally devoid of evidence to support such an inclusion and, moreover, the data submitted by AFMA and others clearly support exclusion of feed mills from any final standard.

III. THE RECORD CONTAINS NO SPECIFIC EVIDENCE WHICH INDICATES THAT FEED MILLS SHOULD BE INCLUDED WITHIN THE SCOPE OF THE PROPOSED STANDARD

A. OSHA's Basis for Including Feed Mills Is Not Supported by the Record

OSHA's sole support for including feed mills under the proposed rule is a reference to the National Academy of Sciences' (NAS) report entitled "Prevention of Grain Elevator and Mill Explosions."

In his testimony, Barry J. White, OSHA Director of the Directorate of Safety Standards Programs, conceded that OSHA's decision to include mills within the scope of the proposal was based almost exclusively on the NAS report:

> We put alot of emphasis on that [NAS Report]. We felt that we were relying on the Academy, that they had looked into the information, and one of the things you're bringing out we'd agree. I think we have stated very clearly in the proposal, we're not sure, that this is most of our information, we'd better look and see if there is more behind it. Hearing Transcript, Washington, D.C. Hearing (pp. 71-2)(June 12, 1984). Hereinafter all references to the Hearing Transcript will be designated as follows: (Transcript -- page, date, city, and state).

Because of OSHA's strong reliance on the two-page appendix to the NAS report as a basis for including mills, AFMA undertook an exhaustive review of that report and its antecedents to determine whether the NAS conclusion was justified. The NAS statement is not supported by any empirical evidence. It is based totally on theory and supposition. As demonstrated in AFMA's Risk/Benefit Analysis as summarized below, the NAS and USDA reports and the historical data upon which they are based are fatally flawed. They provide no justification for including feed mills within the scope of the proposal.

B. Explosion/Fire Data Relied Upon by OSHA Does Not Justify Including Feed Mills Within the Scope of the Proposed Rule

1. Historical Evidence of Explosions/ Fires in the Grain Handling Industry

The primary source documents used by OSHA and its consultants to develop the risk/benefit estimates were: "Prevention of Grain Dust Explosions in Grain Elevators and Feed Mills" by a Special Task Force established by USDA; explosion data collected by USDA's Federal Grain Inspection Service (FGIS); the National Fire Protection Association (NFPA) survey and fire incident data; the U.S. Census of Manufacturers; and OSHA's "Survey of Injuries and Illnesses in the Grain Handling Industry." The NAS study relied heavily on the USDA Task Force study for empirical information and made no quantified estimates of its own. Thus, the adequacy and reliability of the historical predicates are critical to the determination of whether it is appropriate to include feed mills within the scope of the proposed standard.

In studying "hazards in the grain handling industry," the emphasis has centered almost exclusively on grain elevators. The process industries, including feed mills, were considered almost as an afterthought. The main focus of the USDA Task Force Report was on grain elevators. All other facilities were grouped into one category, inaccurately labeled "feed mills." Fire data in the report was limited exclusively to grain elevators. The vast majority of explosions/fire incidents attributed to "feed mills" either did not occur in a feed mill, were not verified by USDA, or were attributable to causes totally outside the scope and purpose of the proposed rule.

The USDA Task Force study contained data on 250 grain dust explosions from 1958 through 1978. Eighty-two (82) of these 250 explosions supposedly occurred in "feed mills." In defining "feed mill," however, USDA erroneously included all facilities which were not grain elevators. Flour mills, soybean processors, wet corn millers, rice millers, seed cleaning facilities, cereal mills, pet food plants, and even some grain elevators were erroneously included in the "feed mill" column. Many of these incidents were fires, not explosions, some were not fueled by grain dust, and many others were not verified. In summary, as is fully explained in AFMA's Risk/Benefit Analysis, USDA Task Force data, which is the cornerstone of OSHA's demonstration of significant risk to the feed industry, are seriously flawed.

Similarly, the NAS study, "Prevention of Grain Elevator and Mill Explosions (1982)," fails to provide an adequate basis for applying this rule to feed mills. When the NAS study was first commissioned, the scope of the study was limited to grain elevators. It was later expanded to include process industries. The only portion of the study specifically discussing the process industries was a two page appendix, which made the sweeping statement that feed mills are exposed to the same hazards as elevators. The NAS report provided no explanation or basis for this conclusion other than its reliance on the USDA Task Force study and its hypothetical analysis regarding similarities between mill operations and grain elevators. Thus, the conclusions reached by NAS were unsubstantiated because of the unreliability of the USDA Task Force data. In addition, the Chairman of the NAS Committee which authored this report, Roger Strehlow, has publicly expressed reservations about the scope, application, and compliance burden associated with the OSHA proposal. Moreover, the NAS conclusions totally failed to focus on the vast differences in facility design and production activity between feed mills and large, high throughput grain elevators.

Finally, OSHA's reliance on data collected by the National Fire Protection Association (NFPA) provides no support for including feed mills within the scope and application of the proposal. NFPA data used by OSHA to estimate the number of fires does not include feed mills. NFPA maintains no record of a fire in a feed mill which has caused death or serious injury.

2. Risks/Benefits and Cost Studies Commissioned by OSHA Have Been Totally Inadequate and Fail to Support Inclusion of Feed Mills Within the Proposed Standard

In compliance with Executive Order 12291 and the Regulatory Flexibility Act of 1980, OSHA commissioned Arthur D. Little, Inc. (A.D. Little) to conduct a preliminary regulatory impact and regulatory flexibility analysis on the proposed standard for grain handling facilities. The A.D. Little study was based on a survey of 18 grain handling facilities. It is impossible to develop an accurate risk/benefit or cost analysis for several different major industries based upon an 18 establishment survey covering many industries. Only two feed mills were included in the A.D. Little study. As its source material, A.D. Little relied primarily on the historical reports discussed previously. Due to flaws in these reports, A.D. Little grossly over-estimated the risks faced by feed industry employees by explosions and fires. The A.D. Little benefit analysis was based primarily on totally unrealistic effectiveness estimates which ranged up to 100%. Finally, A.D. Little demonstrated its lack of knowledge regarding the feed industry in grossly underestimating the compliance costs. OSHA displayed so little confidence in the A.D. Little report that it subsequently retained Booz-Allen & Hamilton to conduct a supplemental risk/benefit and economic report.

Booz-Allen & Hamilton conducted no original research. The consulting firm merely reviewed the A.D. Little estimates, which were based on flawed data and corrected some errors in statistical methodology. In addition, Booz-Allen & Hamilton held a one-day meeting of "experts" to assess the impact of the proposed rule. Participants in this one-day meeting were neither given a draft of the Booz-Allen & Hamilton report nor were they given an opportunity to endorse or modify the final Booz-Allen & Hamilton report. During the Washington, D.C. hearings, the Booz-Allen & Hamilton representatives conceded that they performed insufficient research to adequately assess the risks, benefits, and costs of the proposed rule to the affected industries.

Accordingly, OSHA has failed to adequately comply with Executive Order 12291 and the Regulatory Flexibility Act which require the preparation of an accurate, comprehensive risk/benefit and economic impact assessment.

C. The Testimony Presented at the Hearing by OSHA and its Consultants Does not Support Including Feed Mills Within the Scope of the Rule

The first day of the Washington, D.C. hearings was dedicated almost exclusively to statements delivered by OSHA staff and consultants retained to testify on OSHA's behalf. This testimony is totally devoid of reliable evidence to support including feed mills within the scope and application of the proposed rule.

OSHA's first witness, Barry J. White, Director of the Directorate of Safety Standards Programs, conceded on several occasions that additional information is needed to determine whether feed mills and other process industries should be included within the scope and application of the standard (Transcript, pages 24 and 29, Washington, D.C., June 12, 1984). In addition, Mr. White acknowledged that in determining whether or not to include the process industries within the rule, OSHA needed to balance the risk and benefits, as well as the costs of the proposal (Transcript, page 57, Washington, D.C., June 12, 1984). In response to questions, Mr. White acknowledged that OSHA relied almost exclusively on the NAS report and recommendations for including processors in the proposal (Transcript, 72-73, Washington, D.C., June 12, 1984). At that time, he conceded that additional information and data were needed to confirm the NAS recommendations. As has been discussed previously, no such information or data has been received by OSHA to date to support including feed mills within the scope and application of the rule. Finally, Mr. White explained that the seed industry had been exempted from the proposal due to differences in the structure and operation of seed mills as compared to grain elevators. In response to questions, Mr. White agreed that if the feed manufacturing industry could demonstrate similar differences between it and grain elevators, that an exclusion would be warranted (Transcript, 101-105, Washington, D.C., June 12, 1984). As discussed in greater detail below, AFMA and many of its members have submitted substantial information and documentation describing the clear and significant differences between feed mills and grain elevators both in terms of structure, operation, and risks which warrant exclusion from any final standard.

Dr. Kenneth A. Gilles, Chairman, Grain Storage Handling and Processing Safety Coordinating Subcommittee, USDA, submitted comments to the OSHA docket. Despite the presence of USDA employees in many grain handling facilities, Dr. Gilles indicated that USDA did not explicitly endorse the OSHA proposal. In fact, Dr. Gilles stated that:

> USDA is encouraged by these combined efforts and feels that they will help provide a safe and healthful workplace for our employees."

The "combined efforts" which Dr. Gilles referred to were the voluntary safety programs of AFMA, the National Grain and Feed Association, and the Grain Elevator and Processing Society. Dr. Gilles also suggested that OSHA's benefit estimates "may be over-estimated."

Mr. Murray Jacobson, Assistant Director, Technical Support, Mine, Safety and Health Administration, testified generally that:

> Potential dust explosion hazards exist wherever combustible dusts are made, handled, processed, or accumulated, and dust explosions have occurred persistently in a wide variety of industries, including the agricultural, mining, plastics, chemicals, and metals." (Transcript, 125, Washington, D.C., June 14, 1984).

However, Dr. Jacobson did not testify whether the OSHA proposal should appropriately be applied to the feed manufacturing industry. He conceded that he had no expertise in any grain handling industry and has never been in a feed mill (Transcript, 134, Washington, D.C., June 14, 1984). Moreover, Dr. Jacobson provided no opinion with regard to the potential for fire or explosions of feed dust, which is a combination of agricultural dust plus a whole host of other materials, many of which are liquid or inert material that suppress fires or explosions.

C.W. Kauffman, Department of Aerospace Engineering, University of Michigan, testified generally regarding the explosibility of grain dust. Mr. Kauffman spoke only to the issue of raw grain dust and did not address the question of the explosibility of feed dust containing other ingredients. However, Mr. Kauffman did note that the coal industry has reduced explosions by mixing coal dust with inert ingredients. Thus, Mr. Kauffman provides support for AFMA's position that feed dust, which is a combination of agricultural dust plus inert ingredients, is much less likely to explode than raw grain dust. Moreover, Mr. Kauffman agreed that the slower speed and use of inert ingredients in feed mills differentiates them from the higher risk elevators (Transcript, 198-201, Washington, D.C., June 14, 1984).

Finally, OSHA presented the testimony of Mr. Robert S. Hubbard, a former grain elevator industry employee. Mr. Hubbard's testimony did not include any comments regarding the desirability of applying the proposed rule to feed mills. He testified only with regard to grain elevators.

The foregoing represents the primary testimony presented by OSHA and its consultants in support of the proposed rule. There is no persuasive, empirical, or conclusive evidence in these presentations to support application of the proposed rule to feed mills. Absent such evidence, OSHA lacks the statutory authority to apply the rule to feed mills.

D. Feed Industry Experts Provided Specific Evidence that Feed Mills Should be Exempt from the Proposed Rule

Representatives of the feed industry testifed at all four hearings in support of an exclusion for feed mills from the proposed rule. These witnesses, along with AFMA representatives, demonstrated that there are basic operational differences between feed mills and grain elevators. The feed manufacturing facility typically operates at a much slower speed and has a smaller capacity than a grain elevator. Feed mills generally run year round with little seasonal change allowing for more systematic and scheduled maintenance of equipment. A feed mill generally uses dust-tight equipment which reduces the air borne dust.

Feed industry experts also testified that feed mills typically use a myriad of ingredients, most of which are much less explosive than grain dust. Some of the ingredients are inert fire retardants, such as limestone and bentonite. Other non-explosive and non-flammable ingredients include salt, dicalcium phosphate, monocalcium phosphate, and trace minerals. Feed mills also use a large number of non-flammable liquid ingredients such as molasses, mineral oil, and water soluble ingredients which further reduce the explosibility or flammability of the grain and its dust generation potential. The pelleting process commonly used in feed manufacturing necessitates the inclusion of steam or water to the ingredients, further reducing the risk of explosion or fire.

Raw bulk grain is only a small part of the total ingredient mix used in a feed mill. Soybean meal, animal by-products such as meat and bone meal, dehydrated alfalfa, corn gluten meal, beet pulp, and sugar are just a few of the many major ingredients used to produce livestock and poultry feed. All of these ingredients are significantly less explosive and flammable than raw bulk grain dust.

The same ingredient system is used to receive each of the many components of the formulated feed. The inherent nature of these ingredients makes them much less hazardous from an explosibility/flammability standpoint than raw bulk grain. In tests conducted in part by Murray Jacobson, the U.S. Bureau of Mines found many feed ingredients to present little or no explosibility hazard.

As the testimony and comments of the feed industry representatives indicates, the industry is very aware of the potential risks and is consistently upgrading existing facilities and modernizing new ones to reduce such hazards. For example, several years ago it was determined that electrical wiring and equipment were a potential source of ignition for fires and explosions. Accordingly, over the past several years, the feed industry has replaced thousands of motors in accordance with the requirements of the National Fire Protection Association's National Electrical Code. It has cost the feed manufacturing industry millions of dollars to switch to totally enclosed (dust-tight) fan-cooled motors in classified locations; however, in this instance, the feed industry generally concurred that the change was needed. As another example, new construction of feed mills shows increased use of pneumatic systems, ventilation systems, smooth side wall bin design, and increased automation of product flow in processing.

Enclosing processing equipment, using dust-tight conveyors and electrical equipment, and installing bins and equipment with minimal ledges for areas where dust can accumulate are all ways the industry is further reducing the risk of fires, explosions, and bin suffocation.

Finally, feed industry experts provided detailed testimony regarding the absence of fires and explosions and corresponding deaths and injuries in feed mills. For example, the following feed industry experts testified as to the construction and operation of the feed mill and the absence of substantial risks to employees:

1. Dwight Kopperud, Farmers Union Central Exchange (CENEX) -- Mr. Kopperud testified that CENEX owns twelve feed mills with actual capacity ranging from 11,000 tons to 110,000 tons. Mr. Kopperud reported that his company has no record indicating any deaths or serious injuries attributable to fires or explosions (Transcript III-31, Minneapolis, MN, June 28, 1984).

2. Gaylon Bratland, Director of Safety and Consumer Relations for GTA Feed Division -- Mr. Bratland testified that GTA operates thirteen animal feed manufacturing plants throughout the country. Mr. Bratland reported that there has never been a death or disabling injury attributable to a grain dust explosion or a fire within a GTA Feed Division installation since it began operation in 1958 (Transcript III-41, Minneapolis, MN, June 28, 1984).

3. Ray Lunemann, Production Manager for Supersweet Feeds -- Mr. Lunemann reported that the company operates fourteen feed manufacturing facilities located throughout the Midwest. Mr. Lunemann reported that Supersweet has experienced no serious injuries or deaths attributable to fire or explosion since the beginning of Supersweet Feeds over 25 years ago. (Transcript III-51, Minneapolis, MN, June 28, 1984).

4. Robert Bridge, Norfolk Mills -- Mr. Bridge testified in the over 100 years his family business has been in operation "We have not had a major fire, we have not had a fire-related or explosion-related injury to any of our personnel." (Transcript 245, Kansas City, June 21, 1984).

5. Lester Yoder, Yoder Incorporated -- Mr. Yoder testified about the use of limestone and molasses in his company's product and how these ingredients reduce or eliminate the possibility of explosion or fire (Transcript 422, Kansas City, June 21, 1984).

6. Nathaniel P. Gutwein, President of Gutwein Milling Company -- Mr. Gutwein testified that "in our 64 years of business, we have not had an injury or death from fire or explosion." (Transcript 270, Kansas City, June 19, 1984).

The uncontroverted testimony presented by AFMA and other feed industry experts establishes that there are basic and significant differences between feed mills and other grain handling facilities and that the safety record of the feed manufacturing industry has been exemplary. Without evidence to the contrary, there is no reason to include feed mills within the scope and application of OSHA's proposed rule.

E. Current FDA Rules Applicable to Feed Mills Mitigate Fire and Explosion Risks

The feed manufacturing industry is already heavily regulated by the Food and Drug Administration (FDA). The FDA requires feed manufacturers to scrupulously follow good manufacturing practices (GMPs) in producing medicated animal feeds and premixes. *See* 21 C.F.R. Parts 225 and 226. The GMP regulations require feed manufacturers to maintain a clean facility and to produce feed which has no carry-over or contamination from one product to another. Accordingly, the feed manufacturing equipment must be kept clean to avoid carry-over residues. Moreover, feed mills producing premixes must provide adequate ventilation, screening, dust collection, and temperature controls to avoid any conditions which may adversely impact on the safety or purity of the product. 21 C.F.R. §226.20(b). These FDA regulations and inspection, which apply only to feed mills, coupled with the voluntary industry efforts and advancements in workplace safety, provide further reason for excluding feed mills from any final standard.

F. The Public Comments Overwhelmingly Favor Feed Mill Exclusion

The OSHA Grain Handling Facility Standard attracted more public comment than any rulemaking proposal in OSHA history. There were over 6,000 comments submitted, with only 19 expressing support for the proposal. One-thousand eleven (1,011) comments totally opposed any implementation of the rule. Another 1,080 commentors requested a feed mill exclusion. Two-thousand nine hundred and twenty-three (2,923) commentors requested a small feed mill and elevator exclusion. Sixty-seven (67) commentors requested that all process industries be excluded, and 941 commentors requested that the proposal not be adopted in its proposed form.

There is not one single comment in the record which provides justification for the inclusion of feed mills in the scope or application of the rule. As discussed previously, the only evidence in the record which arguably supports inclusion of feed mills is the hypothetical opinion of Dr. Kaufmann who conceded that he was not a feed mill expert and has visited only two feed mills, one being a local mill where he purchases his bird seed.

IV. THE FIRE AND EXPLOSION RECORD OF THE FEED INDUSTRY DOES NOT INDICATE THAT A SIGNIFICANT RISK EXISTS

The record clearly demonstrates that the explosion and fire potential is many times less in a feed mill than in any other grain handling industry. Feed mills have the lowest fire and explosion incident rate, as well as the lowest death/injury rate in all of the industry segments OSHA seeks to regulate in this proposal. Even OSHA estimates, found in 49 Fed. Reg. 1004-05, demonstrate a much safer working environment in feed mills. Certainly, the wide discrepancy between these incident rates indicates not only the clear justification to exclude feed mills from the standard, but also the inappropriateness of including all grain handling industries in this standard.

In connection with this rulemaking, AFMA surveyed its membership requesting data regarding the number of explosions and fires and associated deaths/injuries which have occurred over the past five years. One hundred percent of AFMA's members responded to the questionnaire. The results from this survey clearly establish that it would be inappropriate to include feed mills in the proposed standard. The survey results show that there have been no fatalities and only seven people injured as a result of explosions and no fatalities and only one injury as a result of fires in feed mills operated by AFMA members in the last five years. The survey shows that in the last five years, AFMA members experienced 19 explosions with no fatalities, and 21 fires with no fatalities. Thus, the vast majority of feed mill fires and explosions do not result in employee deaths and frequently do not involve disabling injuries.

The explosion/fire data utilized by OSHA is seriously flawed and biased against the feed industry. As discussed in considerable detail in AFMA's Risk/Benefit Analysis, many of the fires, explosions and deaths/injuries attributable to the feed industry in the data OSHA used to extrapolate their estimates did not occur in feed mills and/or were not verified. Moreover, the vast majority of explosions/fires identified in the OSHA data have no known causes. Where a cause was identified, many of the incidents would not have been prevented by compliance with the proposed standard.

AFMA believes that a careful analysis of the risks and benefits reported by OSHA by any neutral observer would conclude that the OSHA estimate of baseline risks and benefits is greatly overstated.

V. THE COMPLIANCE COSTS TO THE FEED INDUSTRY ASSOCIATED WITH THIS PROPOSAL ARE TOTALLY OUT OF PROPORTION TO THE HYPOTHETICAL BENEFITS WHICH MIGHT ACCRUE

The cost analysis offered by OSHA reflects a lack of serious study on the part of the agency and its two outside consultants regarding the compliance costs associated with the proposed standard. In order to assess an accurate cost of compliance to the feed manufacturing industry, AFMA retained the T.E. Stivers Organization. Stivers visited and inspected 20 feed manufacturing facilities of all sizes, ages, and designs, and conservatively determined that initial first year costs of the proposed standard for the feed manufacturing industry would be $490,690,000 and the annual compliance costs for subsequent years would be approximately $300,000,000. Copies of the complete Stivers report have been submitted to the record of this proceeding.

Gary Winsett, Chief author of the Stivers report, testified before the OSHA panel at the Dallas, Texas hearings. Mr. Winsett answered the vast majority of questions asked by the OSHA panel and where necessary, submitted additional information to address any lingering doubts. If implemented and enforced, the proposed regulation would be the most expensive regulation in the history of the feed manufacturing industry.

VI. THE OSHA RULEMAKING RECORD FAILS TO ESTABLISH THAT THE PROPOSED RULE WOULD BE "REASONABLY NECESSARY" OR "REASONABLY EFFICACIOUS" AS IT APPLIES TO FEED MILLS AND FEED MANUFACTURING FACILITIES

Section 3(8) of the Occupational Safety and Health Act authorizes OSHA to promulgate standards that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652(8). The Courts have long held that if a proposed standard does not fit within this definition, it is not one the Secretary is authorized to adopt. See, Texas Independent Ginners' Association v. Marshall, 630 F.2d 398 (5th Cir. 1980). Recently, the U.S. Supreme Court ruled that an OSHA standard must be "reasonably necessary and appropriate to remedy a significant risk of material health impairment . . . ." American Petroleum Institute v. OSHA, 448 U.S. 607, 639-644 (1980). In addition, the OSHA standard must be at least "reasonably efficacious" in reducing a "significant risk" of material harm. In this regard, the standard must be economically and technologically feasible; the benefits must bear a reasonable relationship to cost; the standard must adopt the least burdensome technique to achieve the benefit; and the standard must not threaten the viability of the industry or a part of the industry. Id.

The record clearly establishes the feed manufacturing industry has the best safety record of all grain handling industries and has an excellent record relative to the accidents covered by the proposed regulation. This point is demonstrated by both OSHA statistics (See, 49 Fed. Reg. 1004-5) as well as AFMA submissions (See, AFMA Risk/Benefit Analysis and AFMA Member Survey). AFMA believes the record fails to establish that there currently exists a significant risk of material "health impairment" to feed industry employees. Moreover, because the compliance costs of the proposed rule will greatly outweigh any corresponding benefits, it would be inappropriate for OSHA to adopt a final rule applicable to animal feed manufacturers.

VII. CONCLUSION

In its January 6, 1984 proposal, OSHA acknowledged its lack of knowledge regarding the risks in feed mills;

> OSHA is proposing that the standard apply to mills, but the information it possesses on mills is limited. 49 Fed. Reg. 999.

After ten months, four hearings, 2,000 pages of transcript, and over 6,000 comments, OSHA has obtained much information indicating that feed mill employees are not exposed to significant risks from accidents covered by the proposed regulation. AFMA believes it has made its case that feed mills are sufficiently different from other grain handling industries to justify an exclusion from the proposed rule. It is neither appropriate, nor practical to develop one standard for the myriad of facilities which make up what OSHA has dubbed the "grain handling" industry.

In sum, AFMA believes that all feed mills should be excluded from the scope and application of a final rule. Recently, the Office of Management and Budget, based on a comprehensive review of the OSHA proposal and all supporting data, provided additional support for excluding feed manufacturers. In its April 11, 1984 letter (OSHA Docket Entry No. 14-104), OMB concluded:

> Whatever the merits of the proposed standard for large and high throughput grain handling facilities, the available evidence suggests they would be inappropriate for storage facilities such as feed mills and country elevators.

AFMA appreciates the opportunity it and its members have been given by OSHA to participate in this rulemaking. As in the past, AFMA staff and members will be available to work with OSHA to ensure that all reasonable steps are taken to safeguard feed industry employees.

Respectfully submitted,

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NATIONAL
GRAIN & FEED
ASSOCIATION

STATEMENT OF THE NATIONAL GRAIN AND FEED ASSOCIATION

before the

SENATE SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS

COMMITTEE ON GOVERNMENTAL AFFAIRS

U.S. Senate

January 28, 1986

The National Grain and Feed Association requests that these comments be made a part of the permanent record of the hearing conducted January 28, 1986 by the Subcommittee on Intergovernmental Relations on the regulatory review activities of the Office of Management and Budget.

The National Grain and Feed Association is a voluntary association of grain and feed firms. The operations of our 1,250 members include country elevators, terminal elevators, processors and exporters. There are 48 state and regional grain and feed associations affiliated with the National Grain and Feed Association that represent upwards of 10,000 grain and feed companies nationwide. Our members provide the marketing system needed to distribute our country's abundant agricultural production from producers to both domestic and foreign consumers.

The focus of this hearing as announced by the Subcommittee was to be an oversight review of OMB's activities in regulatory rulemaking. The outcome of the hearing was something very different. As it unfolded, it became clear that the hearing was a contrived and orchestrated ruse by certain witnesses to purposefully influence selected rulemaking proceedings now in progress.

Of particular focus at this hearing was the Occupational Safety and Health Administration's rulemaking effort to develop a safety standard for grain handling facilities. Using this rulemaking as an example of OMB's alleged interference in the regulatory process makes the hearing falsely premised, even

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if that had been the subject matter of the hearing. Since the close of the comment period for this standard in November 1984, the grain handling rule has been at OSHA awaiting revisions. The reasons for the long delay in issuing final rules (if any are determined to be necessary or appropriate) is a question to be posed to OSHA, not OMB.

There were many unfounded accusations made during the hearing that OMB and the grain industry were guilty of improper conduct during rulemaking in this standard; that industry somehow unduly influenced the outcome of rulemaking; and that OMB continues to block further promulgation of final rules. Selected witnesses strongly implied that this rulemaking was not conducted in the "sunshine" or subject to public scrutiny and comment. Such views and opinions expressed at this hearing constitute a gross misrepresentation of the rulemaking process that has actually occurred. We submit that there has never been a rulemaking conducted with so much public visibility and opportunity for every interested party to present views. The record was left open for comment for approximately six months during 1984 and there were four public hearings conducted in four cities across the U.S. We submit further that those alleging industry misconduct in this rulemaking are themselves guilty of misconduct.

In testimony, Ms. Deborah Berkowitz states she has reviewed a draft of the final grain handling industry standard, prior to OSHA's submission of the final rule to the Federal Register, a clear violation of the Administrative Procedures Act. Ms. Berkowitz's purpose in this hearing was not to express views on OMB's role in the regulatory process, but to attempt to influence the outcome of OSHA's internal review of the proposed rule. Our Association, and to our knowledge, no other company or trade association in our industry had access to nor sought the documents which Ms. Berkowitz states she has seen.

The testimonies of Ms. Berkowitz and Mr. Jackson, and their responses to oral questions, contain many inaccurate and misleading remarks concerning how this rulemaking was conducted; the proposed standards and their effect on workplace safety; and reasons for the delay in promulgation of final regulations. Anyone who has studied the testimony presented in OSHA's rulemaking proceeding, conducted during most of 1984, understands that there are no simple or easy answers to preventing fire and explosions in grain handling facilities, even though the industry has already made great strides in improving workplace safety.

Likewise, it is not surprising that OSHA is experiencing substantial internal delays in promulgating final rules. OSHA's proposed standard, as was demonstrated in full view "in the sunshine" during four public hearings, was seriously technically flawed in many respects; was extremely costly; and would have done little to improve industry safety. OSHA supported its proposed standard with flawed economic studies of benefits and costs that were based upon scant real-world data. Following public comments on this proposed standard, OSHA had little choice but to thoroughly review and reconsider virtually all elements of the standards. To do less would have been irresponsible in view of the public record.

In this statement, we will attempt to correct some of the inaccurate and misleading statements made during this hearing. However, we suggest that anyone truly interested in understanding the grain handling industry standard should study the public record of comments and testimony. We submit that rulemaking should be carried out by agencies and departments of government as charged by Congress and not in congressional hearings.

There are three principal areas of inaccurate testimony that we will address: 1) Statements implicating OMB in delaying promulgation of OSHA's final rule; 2) Repeated assertions in testimony that explosions are easily preventable by dust control and that there is scientific evidence supporting this theory;

and 3) Allegations concerning the nature of the relationship between industry and OMB and their involvement in rulemaking.

1. Statements implicating OMB in delaying promulgation of OSHA's final rule.

A number of comments during testimony of the January 28 hearing referred to some form of covert action on the part of OMB in blocking issuance of final rules. This is a ridiculous premise for this hearing if the grain handling standard is used as the prime example. (We informed Senate staff of this fact in November 1985.) This proposed rule has been in OSHA's hands since November 1984. To our knowledge, OSHA has not even sent the rule to OMB for review since that time. OSHA should be held accountable for any delays that are viewed by Congress as excessive. Obviously, the stated purpose of the hearing became a facade for certain hearing participants to attempt to manipulate the final outcome of rules currently under active consideration by a regulatory agency.

Considering the fact that the grain handling standard is under active consideration by OSHA, we submit that much of the discussion that transpired at this hearing was improper. We agree that OSHA should make decisions on workplace rules within guidelines specified by Congress and the President, and base those decisions on the public record accumulated as part of the rulemaking process. Rulemaking should be done on the basis of scientific evidence, not politics. Likewise, Congress should not permit congressional hearings to be used as a ploy by anyone to influence rulemaking, especially when such hearings are specifically designed to provide a forum for a single viewpoint.

To respond to the alleged involvement of OMB in delaying rules, a brief history of the rulemaking may be the best means to correct the record of this congressional hearing. Following the comments and public hearings on the proposed standard, OSHA undertook a thorough review of the entire standard and commissioned a new study on its economics. This action became necessary as public comments "in the sunshine" demonstrated beyond a doubt that proposed rules were seriously flawed, and economic analyses conducted by consultants to OSHA were found to be seriously devoid of any credible data.

In the rulemaking, economic studies performed for OSHA by Arthur D. Little and Booz-Allen were shown to underestimate costs and overestimate benefits of the standard, by as much as tenfold. These two economic studies had weak underpinnings in factual data. They were based upon 18 plant site visits, literature reviews, interviews and a panel discussion.

A separate analysis prepared for the industry by Midwest Research Institute was based upon a detailed survey of 812 grain facilities nationwide. This study demonstrated that annualized costs of the proposed standard approached $240 million with a net present value of ten year costs of $1.5 billion. This study clarified that the costs of proposed housekeeping provisions were much greater than expected benefits. Housekeeping costs were estimated to comprise approximately 85 percent of the costs of the standard.

It is indeed doubtful that OSHA's proposed 1/8th-inch dust level will significantly enhance safety, since research has found that as little as 1/100th of an inch of grain dust is sufficient to fuel the spread of an explosion. (See section 2.)

As OSHA's proposed regulations were premised on using dust control to "prevent" explosions, comments during public rulemaking indicated this thrust of the standard was misdirected, which necessitated an extensive and thorough review of the original proposal.

There were many other serious questions with OSHA's proposed standards expressed in the rulemaking process. A number of specific language suggestions for final rules were suggested to address the potential hazards within the grain industry without placing unrealistically strict and specific requirements upon grain handling operations. Our Association's comments at each of the public meetings and hearings as well as written comments are enclosed for your reference.

Throughout the rulemaking, we have been very open about our concerns with the standards and believe that the public record on the OSHA rulemaking indicates that our concerns are valid. We do not know the reasons why OSHA has delayed promulgation of rules. To our knowledge, OMB has received from OSHA no revised rule since 1984. We do know that public comments on the proposed standard demonstrated that it was seriously flawed, and that this rulemaking generated the largest outpouring of public comments on any issue in OSHA's history. OSHA had little choice but to reconsider all aspects of its standard and undertake extensive additional economic analysis.

2. Assertions that explosions are easily preventable by dust control and that there is scientific evidence supporting this theory.

The following statements are taken from testimony and questions and answers in the January 28, 1986 hearing before the Senate Intergovernmental Relations Subcommittee.

> "Had the standard OSHA wanted been in place, Mr. Chairman, the standard that would have mandated that grain dust levels be controlled, this tragedy may have been prevented."
>
> "The National Academy of Sciences wrote a report defining how explosions could be prevented, and you have OMB coming back to OSHA saying that they don't know how to prevent explosions...When the National Academy of Sciences wrote the report on how to prevent explosions, they said: All you need is 1/64th of an inch of dust to sustain an explosion."
>
> "As these witnesses have pointed out, it is only one of many disasters that have taken place across the country that could be prevented by a grain dust standard."
>
> "We know what the risk is. It has been demonstrated in explosion after explosion. Nor is it a question of what is necessary to determine that risk and to prevent the hazard. We know how to do that.

> The National Academy of Sciences has studied it. OSHA has studied it. It has gone through a lengthy process of review, and we know exactly how to prevent these tragedies."

These statements, made during the course of the subcommittee hearing, are based on conjecture or misapplication of information readily available in the public record and have no scientific basis. Testimony suggesting that several recent explosions could have been prevented by the promulgation of the grain handling standard is blatantly inaccurate. Nothing in the record of the OSHA hearings conducted on this issue supports such a statement.

Witnesses cited a report issued by the National Academy of Sciences (written as a result of its investigations of grain dust explosions) as a scientific basis. It was alleged before the committee, that the Academy strongly supported a 1/64th-inch dust level for accumulation of grain dust. However, in the report published by the National Academy of Sciences, the 1/64th-inch recommendation is not contained in any of its priority actions. Rather, the National Academy of Sciences suggested that, as a first priority action "(facilities should) establish a housekeeping program involving a mechanical dust collection system supplemented by manual or other means." This recommendation recognizes that housekeeping is important without placing an unrealistic specific "number" on grain dust accumulations.

In addition, there is good cause to question whether this National Academy of Sciences report should be relied upon as a source of technical information. For example, one of the reports contains the qualifying statement:

> "The subpanel report comprises information that was submitted as background to the panel deliberations and, as such, has not been reviewed in accordance with usual NRC review procedures. The views presented in this document are those of the subpanel members only."

The fact is, though, that while housekeeping is important, it is only one element of an overall balanced safety program. To effectively reduce the probability of explosions, each of the elements of an explosion -- ignition, fuel, oxygen and confinement -- need to be addressed. A comprehensive approach that addresses *each* of these essential elements is much more likely to effectively reduce the potential for an explosion. The OSHA proposal would have directed a disproportionate amount of effort and the vast majority of an elevator management's available funds on only one of the four elements of an explosion, grain dust. Such an approach would be misdirected because research has shown that grain dust cannot be reduced to levels that would prevent an explosion from spreading. Even OSHA itself admits in its proposal:

> "OSHA does not believe that any level of dust accumulation can be considered completely safe. However, OSHA also realizes it is not feasible, and may be impossible, to remove all dust accumulations at times."[1]

Regardless of this public admission of the futility of relying solely on dust control by OSHA in the rulemaking, there were repeated assertions in the January 28, 1986 hearing that the OSHA grain handling safety regulations would have prevented several explosions had they been finalized. It was claimed that the housekeeping provisions of the drafted safety regulations could have prevented several recent explosions.

The facts are that the explosion in Marion, South Dakota has been cited by the Occupational Safety and Health Administration as being caused by an electrical motor used to drive a drag conveyor. The proposed OSHA standards do not address electrical safety, as this was the subject of a finalized rule by OSHA in 1981.

Likewise, there is no basis for claiming the explosion in Corpus Christi, Texas would have been prevented by an OSHA safety standard.

An OSHA Report[2] published May 1984 stated the following concerning the Corpus Christi facility:

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[1] 49 *Federal Register* No. 4, p. 1000, January 6, 1984.

[2] *An Investigation of Fourteen Grain Elevator Explosions Occuring Between January 1979 and April 1981*, OSHA, U.S. Department of Labor, May 1984.

> "The level of housekeeping within the elevator was excellent. Little or no dust could be found on any surface in the elevator. The only dust which appeared to have accumulated was inside the hooded conveyors, the bucket elevators, the head house bins and the grain silos."

Explosions are not going to be prevented by strict requirements on housekeeping (layered dust) or airborne dust concentrations inside equipment.

Research shows that there is no "safe" dust level which would prevent flame or explosion propagation that could be achieved or maintained in a grain handling facility. OSHA recognizes this fact in the appendix and the preamble to its proposed standard, noting there is no "safe level" of dust and recognizing the hazards of even 1/8th of an inch of dust.

A research project, entitled "Dust Explosion Propagation in Simulated Grain Conveyor Galleries," performed for the National Grain and Feed Association by Factory Mutual Research Corporation, found that less than 1/100th of an inch of grain dust is sufficient to fuel the spread of a flame front. The report states: "The experiments in the large-scale facility essentially reconfirmed the fact that values of dust loadings are capable of supporting flame propagation in an elongated structure. In this case, flames were observed to reach to the open end of the gallery from nominal fuel concentrations of 77 grams per cubic meter, corresponding to a layer of cornstarch 1/100th-inch thick."

Further, the Factory Mutual research conducted for the National Grain and Feed Association indicated that less than 62 percent of the 1/100th-inch dust layer "picked up" actually was involved in the flame combustion process of the gallery explosion test. This data suggest that a fraction of 1/100th of an inch of dust can fuel a flame front. These minute dust layers cannot be avoided in operating grain facilities. Clearly, a 1/100th-inch action level is not obtainable nor practicable in an operating facility. Therefore, too much reliance on housekeeping or dust control would be a critical mistake in addressing safety. Rather, we believe that a more balanced approach that addresses all elements of an explosion is more prudent.

Additional information is contained in the public record on the role of housecleaning and dust control on prevention of explosions. But to summarize, the preponderance of the scientific evidence available suggests that only minute quantities of dust are needed to fuel explosions, attesting to the futility of trying to prevent grain dust explosions with dust control alone. Contrary to testimony presented at the January 28, 1986 hearings, the public record indicates that housekeeping plays a role in elevator safety, but improvements in safety are most effectively accomplished by a balanced approach addressing all four of the elements necessary for an explosion: fuel, oxygen, ignition and confinement.

3. Allegations concerning the nature of the relationship between industry and OMB and their involvement in rulemaking.

The following statements are taken from testimony and questions and answers in the January 28, 1986 hearing before the Senate Intergovernmental Relations Subcommittee.

> "The extended OMB review of the proposed OSHA standard resulted from a series of private meetings between OMB and certain parties interested in maintaining the status quo. These meetings took place after OSHA had already obtained the views of those parties, and these were private meetings."
>
> "OMB had met with industry, who just said that the standard wouldn't work and is too expensive."
>
> "They worked out a compromise between the industry, they thought, the unions, and the experts that 1/8th-inch, which is eight times higher than what is really the safest level."
>
> "What has happened is that this procedure established in the beginning of 1981 has given some business interests who don't want regulations of this kind the ability to hot-wire the regulatory process."

These statements imply collusion between OMB and industry, or at best, improper behavior on the part of industry. Again, let us set the record straight. Three persons from our Association met with OMB on *one occasion* to brief OMB on fire and explosion research being funded and conducted by the grain handling industry and to present our views on the effectiveness of the standards in promoting safety. There was *nothing* stated at this meeting or exchanged in the form of written material that is not a part of the public record. And, in fact, a letter of acknowledgement of the meeting was sent by our executive vice president to OMB, placing on the record the fact that the meeting occurred.

Concerning OMB's behavior, it is our observation that OMB's actions in the rulemaking proceedings are not done without everyone involved being aware of their views and involvement. In this particular rulemaking, OSHA has been more than happy to indicate where changes in its proposed standards resulted from OMB's input. One example is OSHA's willingness to indicate that the revised housekeeping provisions contained in its proposed standard followed after OMB's input. Mr. Barry White, director of safety standards programs of OSHA, made the following statement during the public hearings held in Minneapolis in June 1984:

> "One of the major concerns of OMB was the proposed housekeeping provision which would require that accumulated dust not exceed an action level of 1/8th of an inch. OMB believed that additional alternatives should be proposed to provide greater compliance flexibility, especially for small grain elevator facilities."

As indicated by the letters submitted to OMB by the grain industry thanking OMB for the opportunity to present its views, the grain industry's participation in this rulemaking activity has been completely in the sunshine and on the public record. We have met with *neither* OSHA or OMB concerning the grain handling standard since the close of the official record in November, 1984. The allegations of secret meetings between OMB and industry representatives are completely unfounded. But, the inside knowledge of some of the labor groups, as to the status and content of OSHA rulemaking activities causes the National Grain and Feed Association to be concerned about equitable treatment of all interests in these rulemakings.

Conclusion

The U.S. Congress has a right and responsibility to investigate and hold hearings on issues of concern to the public. The stated purpose of this hearing -- to investigate OMB's involvement in regulatory rulemaking -- is a matter obviously within the jurisdiction of the Senate Subcommittee on Intergovernmental Relations. What actually transpired at the hearing was something quite different than its stated purpose. The hearing was allowed to be used by selected interest groups to attempt to influence rulemaking now under active consideration by a government agency. The hearing provided a public stage for one interest group to present unsubstantiated allegations against OMB and the grain industry.

In November 1985, representatives from the National Grain and Feed Association met with members of the Senate staff at their request. During these meetings, we shared documents that we had filed with OSHA. We informed Senate staff that the grain handling standard was not an example of OMB interference in rulemaking. We were informed at that time that hearings originally planned for December 1985 were postponed till 1986. Our Association was not contacted again by Senate staff prior to the hearing of January 28, 1986. We appreciate this opportunity to present our views.

NATIONAL GRAIN AND FEED ASSOCIATION

STATEMENT OF

Henry G. Lembeck - G.E.M. Consultants, Inc.
Thomas L. Ferguson - Midwest Research Institute
Kendell Keith - National Grain & Feed Association

BEFORE THE
PUBLIC HEARINGS OF THE
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

CONCERNING PROPOSED STANDARDS FOR
GRAIN HANDLING FACILITIES

June 19 - 21, 1984
Kansas City, Missouri

Post Office Box 28328 · Washington, D.C. 20005 · Telephone 202/783-202

My name is **Henry G. Lembeck**, and I am President of G.E.M. Consultants, Inc. I am accompanied today by **Thomas L. Ferguson**, Head, Process Assessment Section, Midwest Research Institute, **Dr. Kendell Keith**, Secretary-Treasurer and Director of Economic Services of the National Grain and Feed Association, **James E. Maness**, Director of Engineering Services for the National, and **Marc L. Fleischaker**, the Association's legal counsel. Biographical information for Mr. Ferguson and me is attached to this statement for the record.

We have also submitted for the record written reports reflecting the studies we have undertaken. The first report explains in detail the methodology which we used to conduct our survey of the industry. In brief, we conducted 38 site visits, consisting of 20 country elevators, 4 inland elevators, 6 high throughput elevators (including river and terminal), and 8 feed mills. Summaries of information obtained during these site visits have been submitted for the record.

In addition to obtaining specific information, the site visits were used to field test the questionnaire, which was subsequently sent to 1597 industry firms. Valid responses were received from 812 facilities, with sufficient responses received in each category such that we have achieved a valid sample in each industry category. Our survey has produced the most precise data available regarding current industry practices relative to compliance with the proposed rule.

The survey results and site visits were then used to develop accurate estimated costs of compliance with the proposed rule. These are detailed in our Report, and I will briefly discuss our conclusions in a few minutes.

We have also prepared a report analyzing the economic benefits which Arthur D. Little, Inc. and Booz, Allen, and Hamilton, Inc. suggest will result from the rule. We have also submitted that report in writing, but will discuss its conclusions in this testimony as well.

COMPARISONS OF METHODOLOGY

In reviewing the results of the analyses which have been done, it is instructive first to look at the methodology utilized by each of the study groups.

Arthur D. Little -- Literature review, interviews and 18 site visits.

Booz-Allen -- "Grain Industry Panel Discussion," interviews and Arthur D. Little.

GEMCI - MRI -- Literature review, interviews, Arthur D. Little, written industry survey and 38 site visits.

We reach the following conclusions from this methodology. First, ADL has done a good job of obtaining an industry profile, and summarizing relevant literature. However, certain inaccurate assumptions were made, and there can be no doubt that our industry survey produced a better data base and more precise results.

The Booz-Allen study has no economic validity and should be discounted. Other than ADL, the only data sources were the five members of the so-called "Grain Industry Panel Discussion," two other persons not on the panel, and a limited number of telephone interviews. None of the persons in the discussion is responsible for operating grain facilities, and results are basically "guesstimates" of current compliance levels. The lack of confidence in Booz-Allen's conclusions is emphasized by Mr. Lior Samuelson's November 9, 1983 letter to Mr. Jeffrey Goode of OSHA, in which he concedes that "in some cases the panel unanimously agreed that it was not possible to estimate particular characteristics on an industry wide basis." Furthermore, Booz-Allen provides no information on whether the data in its report are the unanimous conclusions of the five panel members, consensus figures, or merely conclusions derived by Booz-Allen that no individual panel member supported. Indeed, we understand that the entire Panel Discussion consisted of a two hour debate. This is consistent with the written proposal preceding the discussion and explaining how it would be conducted, in which it was noted that the moderator would "orchestrate the discussion in such a way that the anticipated differences in opinion result in useful compromises. . . ."

LEVELS OF COMPLIANCE

The basis for many of the different conclusions which have been reached as to costs and benefits is the assumed levels of compliance with the proposed standards. The levels for country elevators are instructive:

PERCENTAGE OF COUNTRY ELEVATORS AFFECTED

Provision	ADL*/	Booz-Allen**/	GEMCI-MRI***/
Emergency Action	100	85	85
Training	100	85	100
Permit System	100	85	85
Bin Entry			
..Safety Harness	100	90	90
..Atmospheric testing	100	10	68
..Respirator	- 0 -	- 0 -	22
..CPR	- 0 -	- 0 -	58
Contractors	100	85	85
Housekeeping	100	90	90
Grates	75-80	75	82
Filter Collectors	- 0 -	- 0 -	- NC -
Driers	90	90	
Emergency Escape	- 0 -	- 0 -	51
Preventive Maintenance	100	85	85
Bucket Elevators (Percent of legs affected)			
..Percent inside legs	85	85	55
..No. inside legs	1.5	1.5	2.1+
..Grounding	85-90	87.5	27
..Inspection doors	1	1	16
..Motion Detection Devices	100	85	79
..Bearings	1	1	5
..Belt Alignment	100	85	97
..Partially inside legs	0	0	36

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*/ Exhibit 1-3

**/ Volume II, Appendix F

***/ Site Visits and Surveys

This chart is the basis for the different cost estimates for compliance with the proposed standard. In general, Booz-Allen has assumed a higher current compliance level than ADL, with no explanation other than an occasional reference to the undocumented panel discussion. The GEMCI-MRI estimates are direct outgrowths of the site visits and industry survey, and represent the most accurate information which is available.

INDUSTRY EMPLOYEES

There are, in addition, other assumptions made in the ADL and Booz-Allen data which have been shown to be inaccurate based on the actual data ascertained by GEMCI-MRI. One of the most important of these is the industry size.

GEMCI-MRI have accepted the total number of firms in the industry as calculated by ADL. However, the survey results demonstrate that there are 30% fewer full-time employees than ADL calculated.

	ADL		GEMCI-MRI	
Type of Facility	Per Facility No. of FT Employees	Total	No. of FT Employees Per Facility	Total
County elevator	6	62,490	5.01	53,116
Inland elevator	8	3,680	12.38	5,695
High throughput Terminal	15	3,750	13.59	3,398
Export terminal	120	8,280	55.39	4,154
Small feed mill	5	15,150	5.03	15,241
Large feed mill	33	34,320	24.19	25,176
Grain Processing	5	48,450		45,400
Oil Seed Processing	6	21,860		
		197,980		152,180

The overestimate by ADL/Booz-Allen has a significant effect on the per-employee cost of compliance. For example, even assuming the accuracy of OSHA's regulatory analysis that "the annualized costs [of the proposed standard] over a 10-year period with a 10 percent discount rate are estimated at $122.5 million per year," even with no pneumatic dust control, the per employee cost is $805 per full-time employee per year. When the more accurate, but still conservative figure which we have developed of $240 million is considered, the per employee, per year cost is over $1500. The net present value of the costs of $1,475,000,000 amounts to almost $10,000 per employee. These are enormous figures for any business.

Notably, unlike in most other regulations, OSHA has chosen not to refer to the per-employee figure in its Regulatory Analysis or in its preamble to the proposed rule. One can only assume that this deviation from normal practice is due to the size of the number. Instead, OSHA and its economists refer to the amount as a percentage of the dollar value of grain handled. This is an extraordinarily misleading statistic in a high volume, low margin, low profit, low employee industry.

BASELINE RISKS

Another important assumption is the baseline risk in the industry. ADL estimates that under current conditions existing in the industry, one would normally expect 25.7 grain dust explosions each year, resulting in 18.7 deaths and 54.0 injuries. ADL arrived at these figures by averaging data for seven years (1976 to 1982). Booz-Allen estimates that under current industry conditions, we can expect there normally to be 24.3 explosions per year, resulting in 16.4 deaths and 48.9 injuries. B-A based its figures on the average of eight years (1976 to 1983). However, as has been pointed out by the Office of Management and Budget, neither ADL nor B-A used data that are representative of real risks that exist today. The safety record of the industry has improved significantly. Using 1978-1983 data, OMB estimates baseline explosion risks at 7.3 deaths per year. Our estimates are somewhat lower than OMB.

SUMMARY

	Explosions	Deaths	Injuries
ADL	25.7	18.7	54
BA	24.3	16.4	48.9
OMB	23.5	7.3	37.0
NGFA	12.6-23.5	6.3-7.3	26.4-37.0

Indeed, ADL, B-A and OSHA have estimated annual reductions in explosions of a number greater than the total number of explosions which have occurred in every year since 1978 except 1981. The number of annual deaths in estimated to be reduced from 18.7 to 4.1, a reduction of 14.6. However, the total number of deaths from explosions has never exceeded 13 in any year since 1977, and with the exception of 1976 and 1977, has not exceeded 15 since at least 1958.

The same discrepancy is true for fires. ADL estimated there are a total of 2,200 fires annually in the industry, 55 of which are major fires. These data were based on National Fire Protection Association ("NFPA") data from 1958 to 1975 (no data exist for subsequent years). NFPA data reported an average of 11 major fires during this period but ADL interpreted this as being a significant underreporting of actual major fires. They multiplied the 11 reported fires by a factor of 5 and justified this by a comparison of reported explosion data from NPFA and USDA. (According to this comparison, NFPA only reported about 21% of the explosions that USDA data indicated.)

Booz-Allen estimated there were a total of 2,661 fires annually in the industry, 50 of which were major fires. They arrived at this estimate by using data from a Canadian study that indicated major elevator fires occurred at a frequency of .002874 times per facility per year. Assuming 16,164 grain facilities in the U.S., this frequency would indicate 46.5 major fires per year. B-A decided there were probably about 50 major fires per year with 50 being the approximate midpoint in the range of 55 (estimated by ADL) and 46.6 (estimated from Canadian incident rates).

OMB, we believe appropriately, was very critical of the ADL study, saying that the multiplication of the NFPA reported incident rate by a factor of 5 is inappropriate. OMB based this criticism on the fact that NFPA data were assembled by compiling newspaper reports of fires causing over $10,000 in damage, and the fact that fires reported in newspapers are very likely significantly more serious than unreported fires. OMB confirms this point by showing that for explosions, NFPA data only report 21% of those explosions reported by USDA but in the explosions NFPA data contained 97% of the USDA-reported fatalities and 49% of the USDA-reported injuries. OMB suggests that NFPA reported casualties be adjusted by these estimates of under-reporting rather than the factor of 5 employed in ADL. Thus, OMB estimated 2,200 fires, with .9 deaths and 436 injuries.

These differences are critical not only in assessing the current problems in the industry, but also in calculating the benefits, if any, which will flow from the proposed rule. ADL, an B-A even more, have seriously overstated the benefits which would flow from the proposal as a result.

Finally, estimates of hazards other than explosions and fires differ. ADL estimates that there are 41.3 deaths per year in the grain handling industry from causes other than fires and explosions (including 15 from grain suffocation). They arrive at this figure by comparing some OSHA survey data on explosions to USDA explosion data that indicate OSHA data only covered one death incident in every 3.8 actually occurring. To be conservative, they used OSHA surveys of other injuries and expanded this figure by a factor of 2.8. ADL estimated there were a total of 512.6 other injuries each year, 50% of which resulted in 15 lost work-days and 50% resulting in 65 lost workdays. Booz-Allen estimates there are a total of 43.5 deaths per year from sources other than fires and explosions (including 15 from grain suffocation). They use the same data as ADL and expand their base data collected by OSHA by a slightly larger factor. B-A also estimates a total of 11,524 other kinds of injuries that result in lost workdays.

OMB, again appropriately, criticizes the ADL study, saying that inappropriate methodology was used in expanding the OSHA survey data to obtain a total. OMB makes the argument that the expansion factor should be 1.3 rather than the 2.8 used and offers justifying data. Thus, OMB calculates that 19.5 deaths occur, less than one-half the total assumed by ADL and B-A.

The overestimates of deaths and injuries from explosions, fires and other hazards in the ADL and B-A studies, and the consequential overestimate of the standard's benefits, are illustrated by the bin entry provision of the proposal. As noted, B-A adopts ADL's finding that there are currently 15 deaths by suffocation in the grain industry annually, and that these deaths will be eliminated completely by the proposed standard. OMB points out that this type of effectiveness in OSHA standards would be unprecedented. Perhaps even more striking, B-A estimates (Exhibit I-3) that a very significant number of facilities -- taken as a whole, at least half -- are already in compliance with the proposed bin entry requirements. Unfortunately, this high level of compliance has not completely eliminated suffocation problems. Thus, a 100% effective rate is indeed implausible. However, the result of the B-A analysis is to create a low level of cost for standard compliance (by estimating high current compliance levels), and a high level of benefit from standard compliance (by assuming 100% effectiveness). This is obviously inconsistent, but the tendency to understate the costs and overstate the benefits appears to run throughout the B-A analysis. It flows largely from unrealistic and unverified assumptions forming the basis for the calculations.

BENEFITS

The benefits calculation is also distorted by OSHA. Indeed, when added together, OSHA estimates that the rule will prevent from 78% to 138% of all explosions.

Risk	Percentage Reduction In Explosions
Overheated Bearings	5-14%
Elevator legs - control of dust below lower explosive limit	32-41%
Belt alignment	6-7%
Foreign objects	5-14%
Welding/cutting	9-24%
Drier malfunctions	0-2%
Dust collection malfunctions	0-2%
Static electricity	1-4%
Suspended & accumulated dust	20-30%
	78%-138%

This is inherently unbelievable, of course, since statistically it is impossible to eliminate over 100% of the explosions. (Notably, OSHA's Regulatory Analysis reaches these conclusions separately, but does not add them up.) The Federal Register preamble assumes a 70% reduction in explosions.

Benefits estimated by Arthur D. Little, and Booz-Allen, and Hamilton, Inc., for the proposed OSHA standard on grain handling facilities are primarily dependent on:

... Methodology for quantifying the value lost from disabilities and death;

... Rate of return; and

... Reduction of damage and casualties from compliance.

Both analyses ignore the added risk incurred by construction activities and increased housecleaning manpower.

There are two methodologies for quantifying the value lost from disabilities and death: human capital and willingness to pay (WTP). The human capital approach estimates the value of lost earnings as a valuation method. The WTP approach attempts to establish the price workers would pay to avoid or reduce the chance of injury or death. The human capital approach underestimates the value and the willing-to-pay approach tends to overestimate the value of reduced death or injury. Booz-Allen and ADL used different estimates for the WTP estimates from the literature. Arthur D. Little used an average value from its literature search, whereas Booz-Allen used a current but also high estimate by Viscusi.

	A.D. Little	Booz-Allen
Temporary Disability	$ 34,100	$ 34,100
Permanent Disability	682,300	682,300
Death	772,100	3,500,000

The high benefit to cost (B/C) ratios for Booz-Allen are caused by the high value placed on death, as well as the inflated assumption as to how many lives would be saved. B-A's use of the large death figure is particularly ironic since it purportedly relies on W. Kip Viscusi's analysis in Risk By Choice. (See B-A at II-6). This is indeed misleading. While

Viscusi does describe that such an implicit value has been placed on life, he proceeds to point out that "the views of outside analysts or government officials as to what these premiums ought to be should not be pertinent." (Viscusi, p. 102). Proceeding to analyze the values which workers themselves place on life, he concludes that "for the purpose of policy evaluation, the . . . estimates of $500,000 seem most appropriate for workers in highrisk jobs. . . . For workers facing less severe risks . . . an estimate of $2 million appears more reasonable." (Viscusi, p. 106). Thus, B-A has chosen a figure at least twice as high as suggested by Viscusi. When multiplied by the assumed effectiveness of the regulations, the effect on the benefits calculation is dramatic. Thus, for example, if updated casualty figures were used (7.3 deaths from explosions), and a $1,500,000 death value adopted, these two changes alone (even assuming the 70-100 percent effectiveness) would reduce B-A's benefit calculation by 70 percent.

Moreover, records show that the casualty rate for explosions in country elevators is relatively low: 0.14 death and 1 injury per explosion for country elevators versus 0.73 death and 2.1 injuries for the industry. The low occupancy of personnel in confined spaces probably contributes to this fact. Addition of personnel for housekeeping during the harvest season could double the number of individuals at risk in country elevators.

A greatly increased level of construction activity with modifications to existing county elevators will result in a high incidence of accidents due to do-it-yourselfers and inexperienced contractors and labor. OSHA has not accounted for the effect of constructing facilities. There is clear evidence that the probability of explosions and fires while construction is taking place is much higher than when there is no construction activity.

COST-BENEFIT ANALYSIS

Strikingly, even given the very optimistic costs and benefits assessments which have been done, no analysis concludes that the benefits of any of the housekeeping proposals come close to matching the costs.

ANNUALIZED COST-BENEFIT ASSESSMENT

	Cost		
	ADL	B-A	GEMCI-MRI
1/8" Action Level	105,600,000	103,430,000	213,334,000
Once per Shift Sweeping	70,800,000	46,478,000	213,975,000
Pneumatic Control	941,917,000	443,522,000	(not feasible)

	Benefit		
	ADL	B-A	NGFA
1/8" Action level	38,700,000	98,600,000	7,600,000-
Once per Shift Sweeping	27,600,000	25,100,000	12,400,000
Pneumatic Control	107,400,000	114,100,000	(not feasible)

This is, in our view, an unprcedented acknowledgement by everyone who has studied the issue that, even at its best, the housekeeping propsal should not be adopted in any form in which it has been proposed. While economics is not a precise science, and a precise 1:1 cost/benefit ratio may not be mandatory, there should be some rational expectation that benefits exceed costs. Indeed, in our view the costs of the 1/8" proposal, for example, outweigh the benefits by at least 15 to 1.

Furthermore, as we have demonstrated, the costs of compliance with the other portions of the proposed regulation have been vastly understated. The most significant initial cost differences can be summarized as follows:

	ADL	B-A	GEMCI-MRI
Bucket Elevators	52,971,000	44,421,000	95,877,000
Grain Driers	4,645,000	1,597,000	17,577,000
Emergency Escape	- 0 -	- 0 -	18,102,000
Grate Openings	17,196,000	1,671,000	11,087,000
Bin Entry	8,903,000	1,801,000	11,402,000

The different estimates are discussed fully in the report which we have submitted. Suffice it to say here, however, that the GEMCI-MRI data are based on actual industry input, and total initial costs, using the 1/8" standard, are calculated at $556,567,000. This is 2.7 times the amount used by Booz-Allen. We have calculated annual recurring costs of 269,488,000, which is almost twice the figure used by Booz-Allen. These data are fully discussed in our Report. It is clear, however, that there is no substantial evidence that the benefits which would be achieved by each individual section even approach the costs.

One other point needs to be made here. ADL calculated the average profits of various types of facilities. (See page VIII-6). The country elevators $2,500 after tax profit should be compared with the compliance cost of the proposal, which is several multiples higher. This can be charted as follows:

	Before Compliance Average Profit *	Cost of 1/8" Dust Standard**	Cost of Sweeping**
County Elevator	2,500	$ 1,650 (small county)	1,980
		4,950 (average county)	6,930
		13,500 (large county)	18,900
Inland Terminal	20,000	60,000	74,400
High Throughput	157,500	60,000	120,000
Export Terminal	450,000	189,000	567,000
Small Feed Mill	11,000	4,950	6,930
Large Feed Mill	270,000	60,000	120,000
Processing Plants	160,000-500,000	18,750	28,125

* Calculated by ADL - Page VIII-6

** Calculated by GEMCI-MRI

The implications are staggering for this industry, which could not sustain itself if the proposed standard were adopted. The housekeeping standard itself would alter the structure and nature of the industry as it exists today. Many facilities would become unprofitable. In short, this proposed standard is not feasible for the grain industry. Its adoption would have a devastating impact on the grain industry, as well as on our country's cost of feeding itself and our balance of payments. It is economically irresponsible and should be rejected.

CONCLUSIONS

In short, we are unconvinced by the economic evidence adduced by ADL, B-A, or OSHA. The available data show that costs overwhelm the benefits of the housekeeping provisions, and exceed the benefits of most other provisions as well. In this context, and given the continuing technical uncertainty and the flimsy profit profile of most elevators, adoption of the proposed regulation would be, at best, an economic gamble which should be avoided.

NATIONAL GRAIN AND FEED ASSOCIATION

STATEMENT OF
THE NATIONAL GRAIN AND FEED ASSOCIATION
BEFORE THE
PUBLIC HEARINGS OF THE
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
ON THE
PROPOSED SAFETY STANDARDS FOR GRAIN HANDLING FACILITIES

JULY 10, 1984

by
C.B. Felts, Jr.
James E. Maness

My name is C.B. Felts, and I am President of Garvey Elevators, Inc., located in Ft. Worth, Texas. I am appearing today as Chairman of the National Grain and Feed Association's Safety and Health Committee, which has taken the lead role for the Association in responding to OSHA's proposed regulations. Accompanying me is James E. Maness, Director of Engineering Services for the National, and Marc L. Fleischaker, our legal counsel.

As the OSHA staff and the other participants in these hearings are no doubt aware, our Association has taken a very active role in these proceedings. We are not doing so in an attempt to be obstructionists. To the contrary, we have an overwhelming interest in assuring the safety of our elevators. This interest has been translated into unprecedented industry research and education efforts. These efforts will continue. We pray, however, that OSHA does not derail our efforts through well-intentioned but sorely misguided regulations. We have made positive recommendations for changes which would be more effective, and more cost effective. We will continue to work with the agency to make our places of work as safe as possible. We will not stand idly by while our industry is transformed -- or even destroyed -- for hoped-for benefits which we doubt would ever be seen.

In my testimony today I will first summarize briefly the positions which we have taken in the three previous hearings. I will then respond to questions and issues which have been raised by various parties in these hearings.

In Washington, our lead witness was R.L. Pennell, Senior Vice-President of Harvest States Cooperatives and a member of the National's Executive Committee. Mr. Pennell reviewed our involvement with OSHA's development of safety standards over the past six years. He noted the Statement of Principles which had been adopted by our Safety and Health Committee that "the grain handling industry has been in the forefront of research and development designed to enhance safety. The industry is dedicated to pursuing and promoting technological innovations, new practices, and safety training and education programs that contribute to safe, effective grain-handling operations." Our industry's commitment to safety is complete, and is reflected in the recent downward trends in explosions and deaths in the industry.

Mr. Pennell also provided an overview of the industry's extensive research programs and safety education and training. He concluded by raising general questions about the approach chosen by OSHA in its proposal to regulate the grain industry, and suggesting that there are "much more feasible and cost effective alternatives."

Our first panel in Kansas City presented a detailed evaluation of the costs and benefits of the proposed regulation. This panel was headed by Henry G. Lembeck, G.E.M. Consultants, Inc., Thomas L. Ferguson, Midwest Research Institute, and Dr. Kendell Keith, National Grain and Feed Association. The panel first discussed the methodology used in preparing its reports. This included 38 site visits, and a written questionnaire sent randomly to 1,597 industry firms. Valid responses were received from 812 firms, representing over 50 percent of the sample size, a very high response rate.

There were a number of conclusions reached based on the industry study. First, G.E.M.C.I. concluded that the studies performed by Arthur D. Little, Inc. and Booz, Allen and Hamilton, Inc. for OSHA were fatally flawed in both methodology and conclusions, and for the most part should be discounted. Second, the study concluded, using the most conservative approach possible and deducting for the current levels of compliance in the industry, that the net present value of the cost of complying with the standard over the next ten years would be approximately $1-1/2 billion, or almost $10,000 per industry employee. The annualized cost, using either the 1/8 inch action level or the once per shift sweeping, would be approximately $240 million. Detailed analysis of these conclusions was submitted, and the panel was cross-examined about them for over 4 hours.

The cost analysis was compared by Dr. Keith with the benefits which would be generated by the proposed regulation. It was concluded that maximum annual benefits would be in a range of $11.7 million to $18.8 million, or some 7 percent of the costs. Even giving the benefit of the doubt to OSHA in connection with the proposal's effectiveness, benefits still ranged from only 25 to 39 percent of the costs.

Also in Kansas City, the National presented three members of our Safety and Health Committee to testify in detail regarding our technical comments on the proposed regulations. Those testifying were William E. Phillips, Continental Grain Company, Lynn Pollan, Bunge Corp., and Gary Barnett, Nabisco Brands. I will summarize the positions which they presented in just a moment.

In Minneapolis, Mark Goedde and James Maness of the Association staff presented an in-depth review of the research efforts which have been undertaken by the industry's Fire and Explosion Research Council. This research forms the foundation for many of the positions which have been taken by the National during these hearings. For this reason, and because the research represents the most up-to-date state of the art knowledge which is available, we suggest that it be considered carefully by OSHA in its further deliberations concerning what should be contained in the final rule.

Now I would like to provide, in summary fashion, the views which we have expressed on each provision of the proposed rules. I want to emphasize, however, that this summary should not substitute for review of the more detailed comments which have been presented during the course of these hearings, and in our written comments. Rather, it is an effort to respond in one place on a section-by-section basis for ease of reference.

Part 1917 - Marine Terminals - The marine terminal standard should not apply to grain handling facilities.

Scope - Change to read as follows:

(a) Scope. This section contains requirements for the control of fires, grain dust explosions and other safety hazards associated with grain handling.

Definitions -

(c)(1) "Acute debilitating health effects." The NGFA recommends that this term be deleted.

(c)(2) The definitions for "choked leg" and "jogging" as well as the bucket elevator provision in (p)(1) are vague, and should be clarified by the addition of the following statement of what is not a "choked leg":

A bucket elevator that has the up-leg partially or fully loaded and has the boot and discharge cleared allowing bucket movement is not considered choked.

(c)(6) and (c)(9) Bucket Elevator Definitions. The definitions of "inside bucket elevator" and "partially-inside bucket elevator" are overly inclusive. NGFA recommends the deletion of the definition and requirements for "partially-inside bucket elevators," which should be treated as outside legs.

To properly differentiate between inside and outside bucket elevators, the NGFA recommends that the following sentence be added to the definition of (c)(6) "inside bucket elevator":

A bucket elevator with the head section located outside and having 80 percent or more of the total leg height above grade outside of an enclosed grain receiving or handling structure is not an "inside bucket elevator" regardless of the location of the boot pulley.

(c)(10) The "small elevator facility" definition should be changed to include all small facilities, as follows:

(c)(10) "Small facility" means a facility which has less than 1 million bushels of permanent storage capacity and less than 4 million bushels throughput averaged over the past three years. Throughput is the total bushels of bulk raw grain received and shipped divided by two.

(d) Emergency Action Plan - The NGFA supports this provision, but suggests that the required elements be set forth specifically.

(e) Training - We support training, and suggest that this section be reworded as follows:

(e)(1) The employer shall provide employees training at least annually and when changes in job assignment will expose them to new hazards. Current employees, and new employees prior to starting work, shall be trained in at least the following:

(i) Procedures and safety practices established by the employer including, but not limited to, rules pertaining to smoking and other common ignition sources.

(ii) Recognition of and preventive measures for the safety hazards which are associated with their work task. Training where applicable includes clearing procedures for choked legs, housekeeping program procedures, hot work procedures, preventive maintenance program procedures and lockout/tagout procedures.

(f) Permit Systems - A permit system can be a valuable tool in raising the awareness of employees to potential hazards. However, technical deficiencies in the proposal's language (discussed in our comments) lead us to suggest the following language for (f)(1):

The employer shall develop and implement a permit system for hot work, except for hot work performed in welding shops and other areas specifically authorized by the employer, and for work requiring entry into bins, silos, and tanks as identified by the employer.

NGFA also recommends that the following language be added to paragraph (f)(2)(ii):

(ii) Entry into bins, silos and tanks must meet the requirements contained in paragraph (g) of this section when there is reason to believe that there may be an atmosphere, equipment or material hazard. The employer shall designate which bins, silos and tanks will require a permit.

(g) Entry into bins, silos and tanks - The NGFA supports giving appropriate instructions to employees, but does not believe that employers can assure that these instructions will always be followed. Thus (g)(1) should begin as follows:

(1) The employer shall direct employees to take the following precautions before employees enter bins, silos, and tanks designated as needing a permit.

Testing should be done only when there is reason to believe an atmospheric hazard could exist. Thus, paragraph (g)(1)(iii) should read as follows:

(iii) Where there is reason to believe that the oxygen level is less than 19.5 percent or if combustible gas or vapor is detected in excess of 10 percent of the lower flammable limit, or if toxic agents are present in excess of the levels listed in Subpart Z of this Part.

Subparagraph (g)(6), regarding CPR, is particularly burdensome for small employers and should be deleted.

(h) Contractors - We support contractor information, but suggest this section begin as follows:

(1) The employer shall inform contractors performing work at the facility of the potential fire and explosion hazards which may affect their safety or that of others. The employer shall....

(i) Housekeeping - We will not now repeat everything that has been said about this proposal, except to note that it is unworkable. It will not accomplish its purported objectives, yet would be extraordinarily expensive and burdensome. We believe that this entire section should be deleted, and be replaced with a single performance provision which requires that:

The employer shall develop and implement a written housekeeping program which specifies the areas and frequency that areas will be checked and/or cleaned, and which specifies dust control and cleaning methods to be used to reduce dust accumulations on floors, equipment and other horizontal surfaces.

(j) Grate Openings - OSHA's own witnesses have disagreed with this proposal. It should be replaced by a requirement that grate openings not exceed 2-1/2 inches in one direction only, except that large openings are permitted when magnets are used to remove ferrous materials from the grain stream.

(k) Filter Collectors - The NGFA believes that grandfathering filter collectors from the requirements in section (k)(2) is necessary and should be retained.

(l) Preventive Maintenance - The NGFA supports preventive maintenance. However, the "assure" language should be eliminated from this section.

(m) Grain Stream Processing Equipment - We support this provision.

(n) Emergency Escape - The General Industry Standards, which provide in sections 1910.36(b)(3) and (8) that exits appropriate to the building should be provided, and that in some cases two means of egress may be necessary, are adequate and should be retained. However, we have no objection if these standards are amended specifically to permit the use of outside ladders as an appropriate means of egress from head houses and other portions of facilities. With this exception, however, the proposal should be deleted.

(o) Bulk Raw Grain Dryers - The NGFA recommends that OSHA delete the portion of the requirement which stipulates that grain dryers be equipped with a device that will detect a clogged condition in the grain stream exit. This would, however, be acceptable as an option for the facility operator.

The NGFA supports the grandfathering of existing facilities from the requirement that grain dryers be located outside the facility, as currently proposed by OSHA.

(p) Inside Bucket Elevators - This section is very expensive, and in many cases is design rather than performance oriented. We have the following specific recommendatons.

(1) We support a prohibition on jogging legs, but suggest the following language:

The employer shall train and instruct employees not to jog bucket elevators to free a choked leg.

(2) The requirement for electrical grounding should be deleted.

(3) This deals with electrostatics, and we suggest the following alternate language:

One year after the effective date of this standard, belting and lagging purchased for installation in bucket elevators shall have a surface resistivity not to exceed 300 megohms according to the manufacturers' specification.

(4) Inspection access in the head and boot sections

should be provided. However, this provision would be equally effective if made more performance oriented by eliminating the use of the word "door" and providing that any access is acceptable.

(5) Small facilities should be exempt from the requirement for motion detection devices. In addition, the requirement that such device be interlocked with conveyor equipment should be eliminated for all facilities.

(6) There is confusion about the bearing provision which needs to be clarified. As clarified, the effective date should be extended until two years after promulgation, and small facilities should be completely exempt from the requirement.

(7) The requirement for belt alignment devices should be deleted.

(8) The NGFA endorses the option to use explosion suppression systems.

(9) Partially-inside Bucket Elevators - The NGFA recommends that this section be deleted.

Appendices - All appendices, which will by their very nature tend to become mandatory, should be deleted.

Our panels have answered numerous questions about these positions I have just outlined, and we are prepared to discuss them further. However, at this time I would like to respond to some of the specific questions which have been raised during these hearings.

Industry Structure - There have been numerous uninformed statements during these hearings regarding the nature of this industry. Let me set the record straight.

Local farmer-owned cooperatives handle between 40 and 50 percent of the grain shipped in the United States. These co-ops are not national firms with huge resources. They are owned by farmers who use the elevator. Thus, increases in costs absorbed by the elevator will result in less money for the farmer owners. As has been testified to on numerous occasions, the export price sets the price for grain at all marketing levels. An elevator or a farmer cannot increase the price at which grain is sold, since the competitive export price represents a maximum level. Rather, cost increases are absorbed by the elevator operator, or the farmer who stores his grain at the elevator. This is inevitable and no amount of contorted logic about "national grain companies" will change this simple fact.

The larger grain companies own a significant percentage of the high throughput and export elevators, but a very small percentage of country elevators. Various state association officials have testified to this fact, which is confirmed by the A.D. Little study.

In short, the high cost of compliance with the proposed regulations cannot be excused because of the large resources of the national companies. By the same token, of course, adoption of the proposal would increase control by these national entities, which have the most significant financial resources, thereby causing increased concentration in all segments of the industry.

Effectiveness of the Proposed Standard - In our view, there has been an absolute lack of evidence presented during these hearings which would indicate that adoption of the proposal in its current form will eliminate or substantially reduce the risk of grain elevator explosions, fires, or other hazards. The conclusions reached by Booz, Allen have not been supported by any evidence in their report or elsewhere. Indeed, the only credible evidence in this regard is the research results presented by the National which shows that a 1/8 inch action level will be of no benefit in reducing the number or severity of fire and explosions. We do concur with some of the ignition source proposals, and the explosion summary prepared by Dr. Kaufmann and Mr. Hubbard indicates that some of those explosions (6 out of 14) may have been preventable had the ignition source controls been in effect. Even this, however, is speculative, and other studies conducted by USDA and NIOSH agree that probable ignition sources can be identified in only half of all explosions. There is no indication whatever that the housekeeping provisions would have been effective in eliminating those primary or secondary explosions, or reducing their severity. Thus, OSHA has not met its burden of efficacy of the proposed rules.

Effectiveness of the General Industry Standards - Certain witnesses have suggested that the housekeeping proposal is necessary because OSHA has been unable to enforce the general industry standards in this area. This has been shown to be untrue on both the federal and state level since the housekeeping provisions of 29 C.F.R. 1910.22 have been utilized. State officials from Iowa and Minnesota testified as to the effectiveness of these provisions, and concluded that they have been just as effective as other provisions of the General Industry Standards.

Industry Trends - There has been uncontradicted testimony from state officials, elevator operators and union members that housekeeping and other safety practices at elevators have improved markedly during the past 6 years. New technology is most pronounced, of course, at new facilities. This improvement is due to industry recognition of explosion and other hazards, and is reflected in improved statistics on death and disabling injuries. This improvement calls into question the basis for the proposed rules.

Insurance - OSHA has assumed that the private insurance market does not effectively regulate hazards in grain elevators. This has been shown to be untrue. Elevator operators and a former insurance executive have testified as to regular visits by insurance companies to their elevators, training programs, and mandated safety improvements. This too calls into question the assumption that mandatory regulations are needed.

Are Pneumatic Devices and Sweeping Needed? - The vast majority of witnesses have testified that pneumatic devices alone, no matter how well maintained, will not produce no visible emissions, and in fact will not eliminate the need for sweeping. Dust is generated even with the use of pneumatic devices. Thus, any requirement to minimize fugitive grain dust, or to deal with both airborne and layered dust, will require the use of pneumatic devices as well as manual sweeping. There is no credible evidence to the contrary.

Validity of Industry Survey - No evidence has been presented which calls into question the survey conducted by G.E.M. Consultants and Midwest Research Institute. The objective, unbiased nature of the survey has not been undermined. The letter sent to respondents sought unbiased, honest answers, and in fact the conclusions reached as a result of the survey are more conservative and produce lower cost estimates than were made by other industry witnesses who presented their own data. The response rate was unusually high for a survey of this type. The conclusions were verified as well by the site visits. Compliance costs are reduced by current levels of compliance. In short, the survey produced extraordinarily accurate results which should be used by the agency in its future analyses.

In this regard, it is noteworthy that the union survey has not been presented as a single document. Thus, we are unable at this time to judge whether its conclusions are consistent with those that we reached. However, we do expect to evaluate this in the post hearing comment period.

Accuracy of Individual Cost Calculations - Ms. Berkowitz has raised questions about the accuracy of the cost figures submitted by individual operators on a form prepared by the National. These questions have been shown to be groundless. The individual cost items on the form have been fully explained and justified, and are in fact lower than costs which have been estimated independently by a number of operators and consultants. Most operators have also stated clearly that they did not include in their calculations costs for anything -- including housekeeping -- which they are currently doing. Thus, the only arguable assertion left is that elevators will not need both pneumatic devices and manual sweeping, and as I noted previously we believe that as currently proposed this is not the case. Thus, the form itself, and the data submitted, have withstood the intense questioning to which they have been subjected.

* * * *

We have made a full effort during these hearings to present a positive approach. We believe that the evidence presented throughout the hearings has validated the positions we have taken. We will, even after the hearings, continue to work with industry and, if invited, with OSHA to make this industry as safe as is humanly possible.

THANK YOU.

NATIONAL GRAIN AND FEED ASSOCIATION

Statement of

The National Grain and Feed Association

Before the Public Hearings of the

Occupational Safety and Health Administration

on the

Proposed Safety Standards for Grain Handling Facilities

By Mark G. Goedde

June 26-28, 1984

Regency Plaza Hotel

Minneapolis, Minnesota

I am here today to inform you about the most dynamic and unified research program ever undertaken by the grain and feed industry. It is a research program that has one overriding objective -- to safeguard the lives of those working in and around grain handling facilities. It is an effort that was spearheaded and is sustained by the industry, without government prodding or involvement. It is a prime example of an industry moving ahead on its own in a determined, concentrated effort to fill a tremendous void in scientific knowledge concerning fires and explosions.

Finally, it is an effort that is particularly pertinent to discuss in this setting. For the research program's objective of discovering practical, workable options to reduce explosion risks has logically obtained several findings that have a direct bearing on the Occupational Safety and Health Administration's proposed safety standards for grain handling facilities.

I am Mark G. Goedde, staff engineer for the National Grain and Feed Association. By education and training, I am a chemical engineer. I have been a member of the National Association's staff for more than five years, and an

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involved on a daily basis with the work of our Fire and Explosion Research Program. I also work with our Association's Safety and Health Committee, which has taken the lead role in analyzing the proposed standards.

The National Grain and Feed Association is a voluntary association of grain and feed firms ranging in size from the smallest country elevator to the largest grain and feed complex. Included in our membership are the owners and operators of every type of facility that would be affected by the proposed safety standards -- country and terminal elevators, waterway facilities, export elevators, feed mills, and processors of grain and its by-products. The Association's membership is comprised of 1,300 companies and 47 affiliated state and regional grain and feed associations that include more than 10,000 grain and feed companies nationwide.

The efforts of the National Grain and Feed Association's Fire and Explosion Research Council, which I will share with you today, are a prime example of a united, total industry effort to help all owners, managers, operators and employees of grain handling facilities. For when it comes to safety, there are no trademarks or brand names. When it comes to saving lives, there are no copyrights.

The concentrated efforts that have brought us to where we are today actually began on December 30, 1977, when the National established a Management Team on Elevator Explosions and Fires. On January 5, 1978, the Management Team formulated and distributed a set of management guidelines of known steps that could be taken to improve safety. The guidelines consisted of: 1) controlling welding and cutting practices; 2) reemphasizing sound housekeeping practices; 3) establishing preventive maintenance programs; 4) enforcing a facility's safety rules; 5) stressing safety communications; 6) reviewing emergency procedure plans; and 7) emphasizing safety training and education. These seven guidelines remain as valuable today as they were seven years ago.

But while these essential components of an overall safety program were known, the Management Team also recognized the fact that grain dust explosions are complex, often having several contributing factors and events. Further, many of the causes of explosions were undetermined. A 1975 study by two Iowa State University researchers, Verkade and Chiotti, found that the ignition sources were unknown in 62 percent of the explosion incidents.[1]

The Management Team laid the groundwork for the research program by compiling a list of subjects needing further study. On January 4, 1978, then-Secretary of Agriculture Bob Bergland called our Association's Chief Executive Officer, Alvin E. Oliver, and asked the National to identify the research needs, pledging that USDA would work on the funding.

On March 6, 1978, the National personally presented to Secretary Bergland and his staff a compilation of 25 research recommendations to be considered by the government for financing.[2] We also listed several major research areas that we believed industry talents and efforts could best be targeted. Your honor, we have submitted a document outlining these research recommendations for the hearing record, as well as an analysis that outlines our progress since then in addressing the research areas recommended to Secretary Bergland.[3]

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[1] Varkade, M. and Chiotti, P., Literature Survey of Dust Explosions in Grain Handling Facilities: Causes and Prevention, Ames, Iowa, March 1976.

[2] Management Team on Elevator Explosions and Fires, National Grain and Feed Association, "Research Projects and Activities for Minimizing the Potential of Elevator Explosions," Washington, D.C., March 1978.

But by the early summer of 1978, it became apparent that there would be little initiative by government to undertake or finance the kind of vigorous research program on grain dust explosions that was needed. Equalled apparent was the fact that although the basic elements of an explosion are well known, there was a tremendous lack of information and scientific data on how those variables and conditions in a given facility can interact to influence the occurrence or severity of an explosion incident. Instead, superficial or erroneous theories, best guesses and hunches were being bandied about as supposed "solutions" to the explosion problem.

For instance, relative humidity, gases emitted by fumigants or decomposing grain, and the potential for sparks from hobnail boots were being cited by prominent government officials, including those within OSHA, as being among the possible factors in explosions. Those hunches have long since been dismissed. Imagine where we would be today had those unfounded theories been allowed to persist!

If anything substantive was going to be learned and accomplished, it was evident that the industry would have to move ahead on its own.

There were three reasons why it was essential for the industry to begin this ambitious undertaking. First, the statistical basis of explosion causes and locations was incomplete and inaccurate. Second, past research information was totally inadequate when it came to the many variables and conditions that can occur in grain handling facilities. While the basic ingredients of a grain dust explosion have been known for some time -- that is the grain dust, ignition source, confinement and oxygen -- the many conditions and variables that can occur at different facilities can greatly affect the explosion phenomenon. Third, there was a lack of information and data on options and methods that could be used to reduce the potential for an explosion.

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[3] Goedde, Mark G., National Grain and Feed Association, "Analysis of National Grain and Feed Association's March 6, 1978 Recommended Research Projects and Activities to Secretary of Agriculture, Bob Bergland", Washington D.C., June 1982.

Action was not long in coming. On July 13, 1978, the National's Executive Committee established a Fire and Explosion Research Council to pursue the needed research, and authorized a fund drive effort. In only six months, more than $1.4 million had been donated by 300 companies, representative of all sectors of the industry. Among the contributors were nearly 200 country elevator operators, who pledged an average of $1,100 each. Contributions also came from terminal and export elevator operators; millers; processors; feed manufacturers, and state and regional grain and feed associations affiliated with the National. Private and cooperative firms, alike, pledged funds. It is indicative of the broad-based industry support that this program has enjoyed from the outset.

The research funds have been expanded because the costs for administrating and operating the research effort have been provided through the National's regular operating budget. Individual companies have donated facilities, equipment and commodities for use in specific research projects. In addition, industry members and the National Association have expended over $900,000 in supporting the research program, including staff salaries and transportation expenses. Research monies have been deposited into a separate account, with the interest earned being reinvested in the research projects.

Thus, by the time this research work is completed, total monies expended will be well over $3 million.

The research is being conducted under the auspices of the 50-member Fire and Explosion Research Council, comprised of the industry's top expertise in the disciplines of engineering, science, safety, operations and management. The Council operates under a well-defined master plan that utilizes a systematic approach for sorting through the many unknowns surrounding elevator explosions. From the outset, we have adhered to this concise management plan when identifying and defining research priorities and projects. This has enabled the Council to target its research efforts on those projects that have the best potential to yield practical and meaningful results. In this way, we have avoided a "scattergun" approach that could have led to faulty or misleading results.

We have utilized two- to five-member committees to establish, direct, oversee and evaluate the research projects from start to finish. Ten committees have been established to date, organized along subject matter lines. Their titles are indicative of the scope and breadth of the research effort: 1) Committee on Bearing Research; 2) Committee on Combustible Gases; 3) Committee on Grating; 4) Dust Concentrations and Explosibility Committee; 5) Elevator Design Committee; 6) Explosion Suppression and Venting Committee; 7) Grain Dust Handling, Utilization and Merchandising Committee; 8) Oil Additives Committee; 9) Static and Metal Sparking Committee; and 10) Technical Screening Committee. The final committee I listed -- the Technical Screening Committee -- is responsible for determining the merits of unsolicited research projects forwarded for the Council's consideration.

Our approach has been to address three of the four explosion elements -- confinement, fuel and ignition sources. Even though the absence of any one of the four explosion elements would eliminate explosions, our research has shown that this is neither achievable nor practicable. While it is human nature to look for simple solutions to complex problems, that tendency should most emphatically be resisted when it comes to grain dust explosions. It is unrealistic and unwise to rely upon the elimination of any one of the four explosion elements. To do so will cost lives. Attempting to do so will create a false sense of security. There are no quick fixes.

Further, our research approach has been to discover as many practical options as possible that individual elevator owners, managers and operators can consider for their own facilities. Each facility is unique in its design, construction and operation. These individual design and operational features need to be taken into account. In addition, whether an option is applicable depends upon whether the facility is new or an existing plant. New facility construction provides opportunities to change designs, equipment and plant layout. Such approaches often are restricted at existing facilities, where management operating techniques, safety rules, implementation of safe work practices, and modification of existing equipment or addition of new equipment can be considered.

Simply put, there is no single, simple solution available to eliminate explosions. All possibilities need to be explored. As many practical options as possible need to be discovered.

Those are the kind of valuable options that have been discovered through the research conducted by the National's Fire and Explosion Research Council in pursuit of its single, overriding mission: To save lives and property. Since its founding in August 1978, the Council has considered more than 125 research proposals. Of those 125 proposals, 35 applied research projects have been awarded that hold the most potential for being workable and effective in grain handling operations.

The research consists of some of the first full-scale field testing ever done on grain dust explosions. Our efforts are centered on full-scale field tests incorporating any needed laboratory tests. Lest you be erroneously misled to the contrary, this research is not confined to the laboratory; there is nothing small-scale about an 80-foot-long gallery; 65-foot-tall bucket elevator; 65-foot-high grain silos; or existing grain elevator facilities -- it is sites like these where the research is being conducted.

The research work is being conducted by a wide range of eminently qualified scientists and research institutions in the United States and overseas. Universities, private research institutions, the U.S. Department of Agriculture and the research subsidiaries of insurance firms and grain companies all have performed projects for the Fire and Explosion Research Council. When awarding research projects, the Council seeks the most qualified scientists and institutions having the equipment and facilities necessary to do the work.

I think it is important, too, to point out that the research results have been disseminated worldwide. One of the Council's founding principles was that the research should not be considered proprietary; rather the results have been shared with anyone who is interested.

The following is a listing of the 15 research organizations conducting the projects awarded to date: The Christian Michelsen Institute, Bergen Norway; The

University of Southampton, Southampton, England; Kansas State University, Manhattan, Kan.; Factory Mutual Research of Norwood, Mass., -- an insurance industry research group; Fenwal Inc., Ashland, Mass.; IIT Research Institute of Chicago -- associated with the Illinois Institute of Technology; Texas A&M University, College Station, Texas; USDA's Grain Marketing Research Laboratory, Manhattan, Kan.; Cargill Inc.'s Grain Research Laboratory, Minneapolis, Minn.; AeroChem Research Laboratories, Princeton, N.J.; Mechanical Technology Inc., Latham, N.Y.; Midwest Research Institute, Kansas City, Mo.; Safety Consulting Engineers Inc., Rosemont, Ill.; The Andersons, Maumee, Ohio; and the University of Michigan, Ann Arbor, Mich.

Twenty projects have been completed thus far. And the results have been far reaching. Major practical explosion prevention techniques have been discovered and implemented.

Before explaining each of the projects in further detail and showing you slides and films of this work, allow me to provide you with a brief overview of just a few of the most significant research developments:

--New design concepts for newly constructed grain facilities have been compiled and shared with the grain industry and other industies. Grain handling equipment is being located outside the main structure, including bucket elevators, trippers, conveyors, scales and distributors.

--Venting and suppression techniques have been developed that are a possible option for combating explosions. A portable suppression device has been developed that extinguishes an explosion in its earliest stages before it can cause damage. For the first time, reliable data have been developed for protecting bucket elevators with vent panels that release when explosive pressures develop, thereby allowing the explosion to dissipate harmlessly into the atmosphere. Research also has been conducted to study ways to vent grain bins, as well as galleries and tunnels.

--Methods to reduce grain dust concentrations have been studied. Research has been completed or is under way on: pneumatic dust control for bucket elevators; the use of oil or water to reduce dust; the potential uses of grain dust; any potential benefits of screening and cleaning grain; and dust explosibility.

--Methods to protect against bearing failure are being examined. A project now is developing a manual for selecting, utilizing and maintaining bearings.

The research findings also have served a useful purpose by disproving several previously hypothesized "causes" of explosions. For instance, it has been found that combustible gases resulting from fumigation or grain decomposition are not present in sufficient levels to pose an explosion risk. A research project examining more than 20 chemical compounds found that concentrations of gases present in grain handling facilities generally were less than 0.1 percent of the lower explosive limit.[4] In addition, other research projects have shown that speculation over the hazards of electrostatic discharges has been greatly overstated since the characteristics of grain and the construction characteristics of facilities prevent the accumulation of charge levels under normal operating conditions.[5] These findings are important in that they allow the efforts of management to be targeted upon potential explosion causes that need to be addressed.

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[4] Midwest Research Institute. "A Survey of Grain Elevator Facilities for the Presence of Combustible Gases/Vapors." Kansas City, Mo., June 1980.

Of equal importance is that during the research effort, the National has distributed information on and encouraged the implementation of techniques known to be effective in reducing the risks of explosions. A prime example is the information that was published and shared by the National in 1980 on ways to avert dangers posed by faulty propane or natural gas lines, which had been cited as the cause of some explosions.[6] In a second printing of this bulletin, the National provided 5,000 copies without cost to USDA's Federal Extension Service for distribution to all county Extension agents.

Description of the Research Projects

Now, let me review with you the 20 research projects completed to date.

Elevator Design: As one of its first projects, the Fire and Explosion Research Council conducted an Elevator Design Conference in September 1979. It was the first meeting of its kind to comprehensively address the many aspects of elevator design that affect safety. The conference was an essential component in the effort of converting state-of-the-art knowledge on the design, operation and maintenance of grain elevators in an effort to improve safety and reduce explosion hazards. Heavy emphasis was placed on design concepts and practical options then available to elevator owners and operators when remodeling or expanding existing facilities, or when designing and building new grain handling facilities. A capacity audience of 425 attended. The benefits of this conference were furthered through the publication of a 500-page book that has become one of the best sources of practical information on how elevator design and operational changes can be made to minimize the chances for an explosion. The book has been distributed worldwide, selling out of more than 1,200 copies.

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[5] Safety Consulting Engineers. "Electrostatic Characterization of Grain and Grain Dust," October 1980 and "Electrostatic Grounding Characteristics of Grain Facilities" Rosemont, Ill., June 1982.

[6] Maness, James E. National Grain and Feed Association. "Explosions Can Be Caused by Faulty Propane or Natural Gas Installations." Washington, D.C., September 1980.

These slides of facilities illustrate many of the new design concepts being utilized in the industry today, many of which are a direct result of the conference and the subsequent research that has been conducted. Note the outside-located bucket elevators and the lack of a gallery above the bins. Also note the absence of a headhouse, the separation of other grain handling functions -- including trippers, conveyors, scales and distributors -- from the main structure, all in an effort to minimize potential hazards. These slides show the use of inclined belt conveyors, open towers and structures, belt tripper turnhead designs and other safety-related characteristics that are being put to use in new and retrofitted facilities.

Bucket Elevator Research: From the beginning, the Council has placed a high priority on developing methods to eliminate or control explosions initiating in the bucket elevator. The bucket elevator -- the device that elevates grain to the top of the facility -- has been found to be the location where many primary explosions occur. The Council sponsored a joint projects with Fenwal Inc. to study two methods -- venting and suppression -- for mitigating explosions that originate in the bucket elevator.

One of the projects answered many questions about whether explosions that occur in the bucket elevator can be vented harmlessly into the atmosphere and away from areas where personnel may be working. The research was conducted on a 45-foot-tall bucket elevator having a cross-sectional dimension of 2.2 by 1.2 feet. Ten vents were installed along the leg casing and in the head section utilizing a vent ratio of approximately five square feet of vent per 100 cubic feet of leg volume. Explosions were initiated under test conditions in various locations of the structure.

The research resulted in the development of safe venting techniques for the head, boot and leg sections of operating bucket elevators. For the first time, reliable data were developed for protecting bucket elevators with vent panels that release when explosive pressures develop. Prior to this project, there were no reliable data on venting this type of equipment.

In this night view of an explosion venting test, you can see that the explosion is successfully vented from the upper segment of the bucket elevator. In venting, it is not just the size of the vents for the volume protected but also how the vents are distributed or placed to protect the volume.

This project also examined the effectiveness of suppressing explosions in bucket elevators.

The research found that explosions could be effectively suppressed prior to the buildup of explosive pressures. The research utilized an engineered explosion suppression system and later a self-contained suppression system was developed. Here is a view of a fully suppressed dust explosion in a bucket elevator. The white cloud is halon. These portable units, shown here, have made suppression devices installed in bucket elevators a more cost-effective option for many facilities. A second project by Fenwal and an extension of the bucket elevator research demonstrated the effectiveness of a specially designed grain distributor in limiting flame propagation. The distributor had a single spout opening so as to limit the pathway of an explosion to one discharge chute.

An additional future use of suppression systems now is being examined by the Council. A project is under way by Fenwal Inc. that is examining the feasibility of equipping suppression systems with temperature detectors in addition to the already incorporated pressure detectors. If this research is successful, it may result in suppression systems extinguishing fires that are not accompanied by explosions. Researchers are examining various heat sources that can occur in bucket elevators, such as burning belting, buckets and lagging, to determine whether the suppression systems can be made to successfully extinguish a fire prior to the development of an explosion.

Galleries and Tunnels: Research also has studied whether galleries and tunnels can be successfully vented to reduce the possibility of an explosion spreading to other areas of a facility. The project was conducted by Factory Mutual Research. Both small-scale and full-size elongated structures were tested to examine the venting ratios needed to relieve an explosion. The full-scale structure was 80-feet-long by 8-feet-high by 8-feet-wide.

In addition to venting, the project studied the amount of grain dust needed to fuel secondary explosions. Previously, only theoretical calculations had been used to estimate the thickness of a dust layer necessary for flame propagation in a gallery or tunnel.

The research found that as little as 1/100th of an inch of grain dust is sufficient to fuel the spread of a flame front. This finding should be of special importance to OSHA since its proposed safety standard cites 1/8th-inch of grain dust as a so-called "action level." This research shows that grain dust cannot be eliminated or minimized to the extent necessary to ensure that the propagation of an explosion will not occur. OSHA's mistaken preoccupation with "minimizing" this single explosion element could have the opposite of its intended effect; that is, it could lead to a false sense of security in grain handling facilities by overly emphasizing a requirement which offers questionable safety benefits. There are many factors that influences the characteristics of a dust explosion. These include the strength of the primary explosion; facility design; the amount and condition (moisture, compaction and agglomeration) of the dust available to fuel the explosion or flame front; and the extent suspended dust concentrations occur.

This series of slides of an explosion in a full-scale gallery is both revealing and sobering in showing just how little dust is needed for a flame to propagate. Here is a view of the dust loading prior to the gallery explosion test. The next picture shows the amount of dust remaining in the structure after the explosion test and reveals that very little of the already minute dust layer sustains flame propagation.

Reducing Grain Dust Concentrations in Bucket Elevators: Two projects have been completed on ways to limit grain dust concentrations in the bucket elevator. And a third follow-up project will soon be under way.

One of the completed projects examined methods of reducing grain dust concentrations inside bucket elevators by removing the dust from the grain before it was handled. Wheat was screened or aspirated prior to handling. This cleaning of the grain did reduce the airborne dust concentrations below the lower explosive limit, however, the research found that explosive dust levels often returned upon the subsequent handling. This indicates that grain would have to be cleaned prior to each handling to prevent explosive concentrations from developing in the bucket elevator. This project, too, shows the impracticality of OSHA overemphasizing the control of grain dust as a the prime solution to the explosion problem.

The second project is examining the feasibility of using dust collection systems to maintain airborne grain dust concentrations to safe levels in bucket elevators. Since there was no accurate way of measuring dust concentrations in an operating bucket elevator, the first phase of this research necessarily focused upon the calibration and use of accurate measurement devices. After months, reliable dust concentration measurement devices were calibrated, and techniques for measuring dust concentrations in operating bucket elevators were examined. A final report is expected shortly on this project.

The third project will continue this initial effort by IIT Research Institute by examining the feasibility of controlling dust concentrations with pneumatic dust control. Methods will be studied for applying this technique to various bucket elevator sizes and configurations.

Silo Venting: Research tests were conducted at the Christian Michelsen Institute in Bergen, Norway, by one of the world's most eminent explosion scientists, Dr. Rolf Eckhoff to see if explosion venting can be used to protect grain bins. The research examined the amount of venting needed to protect grain bins, as well as the conditions under which venting may be most effective. Although the tests ended when the steel bin being tested failed at a pressure of 7 psi created from a corn starch explosion, a great deal of new knowledge was obtained. For one, it was discovered that small amounts of venting can effectively relievean explosion in grain bins. Second, the research found that the amount of grain dust and the degree of turbulence can greatly affect the severity of a dust explosion, thereby affecting the amount of venting needed.

The work found that for suspended dust clouds with little to no turbulence, the amount of venting needed may be one-third to one-half of that recommended by the National Fire Protection Association venting codes for a given volume. This is a significant finding, for it means that the physical limitations and costs for utilizing venting in grain bins may be considerably less than previously thought. It also shows the importance of researching the basis for explosion venting. The results of this project provide the needed new information to reassess venting in large structures.

A follow-up project to this initial bin venting research has been approved. It will examine various placements of vents on the bins. It also will study the effect of different grain dust concentrations, and varying ignition source locations and energies on the effectiveness of vents.

Combustible Gases: Because of questions that were raised concerning the role, if any, that fumigants played in explosions, the Fire and Explosion Research Council awarded two projects to the Midwest Research Institute to measure the levels of combustible gases in grain elevators. The first project measured levels of gases that might be expected to result from fumigation or decaying grains. Gases in four elevators were measured in various regions of the United States and at different times of the year. It found that combustible gases and vapors do not emanate from decomposing or fumigated grain in amounts sufficient to be an explosion factor. It also found that no detectable levels of gases were absorbed by the grain dust to increase its explosibility.

The second project on combustible gases was undertaken specifically to measure the level of fumigants in elevators following fumigation with an 80-20 fumigant or with phosphine. This project indicated that flammable levels are unlikely to occur in elevators, particularly if a minimal amount of air is circulated in confined portions of the facility, such as the tunnel. These two projects completely eliminated the previously speculated concern surrounding the use of fumigants as an explosion factor.

Metal Sparks: Although metal sparks frequently have been cited as a potential ignition source, little was known about under what conditions they should be of concern. Four projects, two of which have been completed, were awarded to fill this void in knowledge. They include:

--First, research has been completed on a study that examined whether a grain dust cloud could be ignited by showers of metal sparks. The project, conducted by AeroChem Research Laboratories Inc., found that a grain dust cloud could be ignited by a constant shower of metal sparks. But the study did not resolve the question of whether sporadic or occasional sparking incidents, such as those that might occur in a grain handling facility, would ignite an explosion.

--Second, a literature survey has been completed on grain dust ignition by friction and/or impact sparks. Conducted by the University of Southampton, England, it concluded that available accident data are not statistically significant for fully addressing metal sparks as a grain dust ignition source.

--Third, a study is in progress on the role of single impact sparking incidences -- such as from a dropped tool or tramp metal -- as a potential ignition source. This work is being done by the Christian Michelsen Institute.

--Fourth -- and perhaps most importantly -- a study is being conducted by Cargill's Grain Research Laboratory to examine the effectiveness of various grate sizes to remove foreign and metal objects from grain. As of now, there is no scientific justification to show that a 2.5-inch-square grate opening, as proposed by OSHA, would provide any greater safety or protection than the openings currently being used by the industry to prevent foreign objects from entering the facility and equipment. The industry currently selects the grate size opening based upon the handling rates and types of grains being received at a given facility. As part of the research project, a survey of 152 grain handling facilities having a total of 393 receiving grates was conducted to determine what grate sizes currently are being utilized. The results showed that only 8 percent of the facilities currently would comply with a 2.5-inch-square grate requirement. The survey shows the following percentages of facilities that would not meet either a 2.5-inch-square grate opening or magnet provision: 48 percent of terminal elevators, 82 percent of country elevators and 20 percent of mills. Thus, the vast majority of grain facilities would need to install new grates or modify existing grates to provide the 2.5-inch-square opening or install magnets at receiving pits.

Static Electricity. The Fire and Explosion Research Council has been a trailblazer in the search for knowledge on electrostatic charging and sparking in powders and grain handling. Because of the total lack of data on the electrostatic phenomenon, seven reseach projects have been awarded. Six of those projects involve:

--An examination of static charge levels on belt conveyors. Measurements of electrostatic charges on conducting and nonconducting conveyor belting found that the potential charge levels at no time reached a hazardous level. Further, the project found there was no relationship between the charge level on the belts and the ambient temperatures or relative humidity existing within the facility.

--A study of methods to measure the resistance of conveyor belting. A portable device was designed which elevator operators could use to measure the resistivity of belting already installed in grain handling facilities.

--Research on the electrostatic properties of grain and grain dust. This study found that although grain can accumulate moderate amounts of electrostatic charges when moving across spouts and chutes, such charges dissipate quickly when grain comes into contact with a device or structure that is well grounded.

--An examination of the electrostatic charges that occur during handling of various bulk powders. The Fire and Explosion Research Council is one of 15 entitites involved in a three-year project at the University of Southampton, England, examining electrostatic properties that occur in a full-scale bulk handling system.

--A study of static charging in grain bins. The project found charge levels that develop during filling of grain bins are not hazardous.

--Examined the electrical grounding characteristics of grain elevators. This study, performed by Safety Consulting Engineers, has special importance considering OSHA's proposal to require grounding of bucket elevators. The research found additional grounding to be unnecessary, since metal-encased bucket elevators are grounded adequately by their construction.

A seventh project begun recently will develop a prototype device to measure belt resistivity that can be utilized in the the facility, bypassing the need to submit samples to laboratories for analysis.

Grain Dust Utilization: Two projects have studied ways grain dust is being utilized, handled, or disposed. One project examined alternative uses of grain dust. The other studied how the industry currently handles dust. This information is important so that those separating dust from grain can safely handle and utilize it.

Additives to Control Grain Dust: Two projects have been awarded to study the effectiveness of various additives -- such as water mist, mineral oil and vegetable oil -- in reducing airborne dust concentrations during grain handling. A joint project with USDA found that spray application of water and oil additives have potential merit as a future option.

A follow-up project to examine the many concerns surrounding the use and effective application of additives is being conducted by USDA as a joint project between the National and the American Soybean Associations. The project also will examine the oils' effect on grain quality and study the economics of oil additives and conventional pneumatic dust control.

Bearings: Two projects have been awarded concerning bearings. A recently completed project analyzed the design, installation and maintenance of major load-carrying bearings in grain facilities. The researchers visited several grain handling facilities and equipment manufacturers to examine common bearing designs and operating conditions. In addition, 15 facilities were surveyed to document bearing installation and maintenance practices. Four major problems associated with bearing failures were discovered: 1) installation and mounting; 2) lubrication; 3) seal failure; and 4) contamination.

A second project has begun that will develop a manual on bearing selection, installation and maintenance specifically for the grain handling industry.

Explosibility of Grain Dust: Two projects are under way to obtain better information on the explosible characteristics of grain dust, including ignition sensitivity, minimum explosive concentrations and rates of pressure rise. This information is needed to formulate more reliable venting criteria and to better understand the dust explosion process. One project is examining the explosive properties of grain dust in a 20-liter test chamber. The second is developing a dust hazard index.

Smoke Detectors: A recently completed project examined the feasibility of using smoke detectors in grain facilities to sense fires and smoke at an early stage. The first phase of the project evaluated how various commercially available smoke detectors reacted to smoldering grain dust. The second phase tested detectors in a grain handling facility to initially evaluate any problems that may arise. Some commercially available detectors appear to offer promise for use in grain facilities, although further testing is necessary.

Smoldering Combustion: A study recently was completed that investigated various ways smoldering fires can begin and and how to detect such fires in varying depths of dust or grain. The project was aimed at determining conditions under which smoldering grain or dust may break into flames and become an ignition source for an explosion.

The Next Stage

Dramatic changes already are occurring in grain handling design and operations because of the research effort. And many more will occur.

Last fall, the Fire and Explosion Research Council launched Stage III of the research effort. Under Stage III, the Council will concentrate its remaining research efforts on project areas that offer ther most promise for yielding practical results. Many of the Stage III efforts will involve follow-up or additional research to pursue promising leads and explosion-prevention techiques discovered through previous projects.

One of the major efforts will be a benchmark conference to be conducted Sept. 27-28, 1984 in New Orleans that will emphasize what has been learned during the five-year research effort. The conference, to be entitled "Five Years of Progress...Applying New Technology for Use in Elevator Operations, Engineering, Design and Safety," will emphasize the retrofitting of existing facilities, as well as the design of new facilities. The conference will examine a wide array of techniques to make existing and new elevators safer.

Other research areas to be pursued during Stage III will:

--examine grain dust concentrations in bucket elevator legs and other enclosed equipment found in grain facilities.

--develop a guide on the maintenance and use of bearings, a long-time trouble spot and potential explosion ignition source.

--determine specific explosion venting techniques for grain bins, as well as galleries and tunnels.

--examine a system for detecting fires and using suppressants to extinguish fires in bucket elevators.

--determine whether smoke detectors can be used successfully under elevator operating conditions.

--pursue more effective hood designs for grain dust collection equipment.

--examine the potential of oil and other additives to control grain dust.

In addition, we view the dissemination of information as an increasing area of emphasis in the future in an effort to make as many persons as possible aware of the new knowledge that has been discovered during the wide-ranging research effort. The National Grain and Feed Association will be spearheading these efforts under Stage IV of the fire and explosion research master plan. We will focus on explosion prevention techniques learned through the research, and how those techniques can be applied in individual grain elevator operations.

Conclusion

In less than six years, these research efforts have increased significantly the knowledge about fires and explosions. We are discovering practical new techniques and options that can be put to use. We have a research program that is receiving widespread industry support and have attracted worldwide interest from other nations. And it is research that has attracted intense interest from other industries that handle combustible powders and dusts, and which experience significant explosion problems.

The research also has accomplished many related benefits, among them serving as a constant reminder to industry members of the importance of safety and of taking action to prevent potential explosion hazards.

Let me briefly summarize. To date, the research has:

--One, resulted in the first comprehensive compilation of available grain elevator design technology focused on ways to minimize explosions and maximize safety. Significant changes in the design, layout and construction of facilities have been implemented. And more far-reaching changes will result from the "Five Years of Progress Conference" to be conducted this September in New Orleans.

--Two, discovered fundamental knowledge on how to vent bucket elevators successfully. The technology from this research already is being used in several facilities.

--Three, examined the feasibility of using explosion suppression systems to extinguish an explosion at its earliest stages in a bucket elevator. A more cost effective, prepackaged dust explosion suppression device has been developed for bucket elevators.

--Four, provided information on the industry's current practices for handling and utilizing grain dust.

--Five, given us a better understanding about electrostatic charges, and a better idea about the level of concern such phenomena warrant.

--Six, obtained information on the effectiveness of utilizing additives, such as water, vegetable oils mineral oil, as a way to reduce airborne grain dust concentrations.

--Seven, discovered that gases emitted from grain decomposition and fumigation are not found in concentrations sufficient to pose an explosion risk.

--Eight, begun extensive research on ways to reduce grain dust concentrations inside the bucket elevator. We also have evaluated the limited potential for using aspiration or grain cleaning devices to reduce dust concentrations to safe levels inside the bucket elevator.

--And nine, provided information to help the industry better evaluate the many aspects of the dust explosion problem and ways to minimize risks.

This is a total, all-out effort. It is an effort that is yielding results. And the results are being put to use.

Be assured that the industry is unyielding in its commitment to move ahead, on our own if need be, to find and implement answers that are practical, effective and scientifically valid in reducing the risk of fires and explosions in grain handling facilities.

I have appreciated your kind attention.

NATIONAL GRAIN AND FEED ASSOCIATION

Statement of

The National Grain and Feed Association

Before the Public Hearings of the

Occupational Safety and Health Administration

on the

Proposed Safety Standards for Grain Handling Facilities

by R.L. Pennell, William E. Phillips and Alvin E. Oliver

June 12-14, 1984
Washington, D.C.

I am R. L. Pennell, senior vice president for corporate and governmental affairs, Harvest States Cooperatives, headquartered in St. Paul, Minnesota. I am appearing on behalf of the National Grain and Feed Association. I am a member of its Board of Directors and Executive Committee. Appearing with me are Alvin E. Oliver, executive vice president of the National Association, and William E. Phillips, assistant vice president for loss prevention and security, Continental Grain Co., and chairman of the National Association's Safety Subcommittee. We are pleased to have this opportunity to comment on the Occupational Safety and Health Administration's proposed safety standards for grain handling facilities.

The National Grain and Feed Association is a voluntary association of grain and feed firms ranging in size from the smallest country elevator to the largest grain and feed complex. Included in our membership are the owners and operators of every type of facility that would be affected by the proposed safety standards -- country and terminal elevators, waterway facilities, export elevators, feed mills, and processors of grain and its by-products. The Association's membership is comprised of 1,300 companies -- both cooperative and independent -- and 47 affiliated state and regional grain and feed associations that include more than 10,000 grain and feed companies nationwide.

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Our firm, Harvest States Cooperatives, was formed in June 1983 when North Pacific Grain Growers of Portland Oregon, and Grain Terminal Association of St. Paul, Minnesota joined together. We are a farmer-owned, regional cooperative serving more than 200,000 producers in 16 states that stretch from the Great Lakes to the Pacific ocean. Harvest States operates export elevators at Kalama, Washington and Superior, Wisconsin, and is part owner of one at Ama, Louisiana. We also operate six river terminals on the Columbia and Upper Mississippi Rivers. We have 116 country and inland elevators and our local affiliates operate 1,160 elevators throughout the Midwest, Northern Plains and Pacific Northwest.

Harvest States' interest in, and commitment to, the safety of our employees, managers and operators is always one of our foremost concerns. The employees in our grain facilities are our neighbors and friends, and often the sons and daughters of our farmer-owners. The people who staff our grain facilities are not merely numbers or nameless faces to us -- we live in the same community, go to church and socialize together. Our children attend the same schools. If the tragedy of a work-related death or injury -- caused by an explosion or other mishap -- were to strike one of us at Harvest States, it would strike all of us. So, we take a vital interest in the safety and well-being of our employees. It angers me to hear or read about irresponsible allegations to the contrary. Harvest States' concern for safety is representative of the absolute commitment that prevails throughout the grain and feed industry.

Besides our desire to protect our most important assets -- our human resources -- it makes plain, good business sense to maintain a safe plant. The grain warehousing, distribution and processing industry is a highly competitive business. We compete not only with our colleagues who operate other grain businesses, but also with producers themselves who in recent years have embarked on an unprecedented program of constructing on-farm storage facilities. On-farm storage capacities today are substantially greater than off-farm capacities. Coming hand-in-hand with the highly competitive nature of our industry are the traditionally low margins with which we operate. The ability to make a profit depends on the ability to keep the grain moving through the facilities. We lose if our facility is damaged by a fire or explosion, or if our employees are absent because of injuries or other work-related causes. And since the grain distribution and processing industry is such a vitally important link in the food marketing chain, the success of agriculture at all levels is dependent upon our success in keeping our plants operating at peak efficiency and peak safety.

The National Grain and Feed Association has been extensively involved with OSHA's development of safety standards for grain handling facilities over these past six years. In addition to testifying twice before Congress on the industry's safety initiatives, we have participated in every public hearing, answered every call for information, and commented on every draft of the proposed regulations. Throughout this long process, OSHA has failed to convince us that it can promulgate safety rules for this diverse grain industry that will usefully augment the significant efforts and initiatives already being undertaken in the private sector. In fact, we are concerned that the proposed safety standards could be counterproductive. We have formulated a statement of principle on the subject which I will read for you now:

The National Grain and Feed Association's position concerning the proposed safety standards for grain handling facilities published Jan. 6, 1984 by the Occupational Safety and Health Administration is guided by the following general Statement of Principle:

"1. The grain handling industry has been in the forefront of research and developments designed to enhance safety. The industry is dedicated to pursuing and promoting technological innovations, new practices and safety training and education programs that contribute to safe and efficient grain handling operations. These programs are vital, first and foremost, to safeguard our human resources -- the employees who work in grain handling facilities. The industry has demonstrated its commitment to safety. This was accomplished without specific OSHA grain handling safety standards. A much more effective approach has been taken by the industry -- through research, safety education and training programs. These programs provide the motivation to actually improve safety. OSHA's proposed safety standards and rules are not the answer -- they could, in fact, detract from safety because they are misdirected, technically infeasible, impractical and costly.

"II. OSHA's proposed standards are significantly flawed in many areas. The National Grain and Feed Association has identified particularly the OSHA-proposed standards' provisions concerning housekeeping, bucket elevators, grates and emergency escape....The statements to be submitted by the NGFA will include demands for changes in and relief from these OSHA provisions for grain handling facilities, in the form of exemptions, grandfathering and time extensions."(1)

Over the course of the four public hearings that OSHA is conducting on the proposed safety standards, the National Grain and Feed Association will document and expand upon the two articles of its Statement of Principle. Today, my colleagues and I will address Article I -- the considerable amount of research and education that has been and continues to be pursued by this industry to enhance safety in grain facilities.

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(1) This Statement of Principle was adopted by the National Grain and Feed Association's Safety and Health Committee during its April 26-27 meeting in Washington at which positions on specific provisions of the OSHA-proposed standards were developed.

Your Honor, we have submitted for the record a chronology of events covering the period from December 1977 to the present which details our participation in OSHA's development of safety standards for grain facilities, as well as other rulemaking proceedings. This chronology also documents the continual involvement of the National Association and the industry it serves in programs designed to improve safety in grain handling facilities. I will highlight the most significant of these activities now.

First, a look at the safety education, information and training programs of the state and regional grain and feed associations that are affiliated with the National Association.

The subjects of safety and fire and explosion prevention are addressed at nearly every meeting conducted by national, state and local industry trade associations. State and regional grain and feed associations have been an effective and active network conveying education and information on explosion prevention and safety to industry members who are eager to receive such information. A survey conducted by the National Association two years ago found that during the period from 1978 to June 1982, total attendance exceeded 35,750 at convention sessions or meetings devoted to explosion prevention conducted by 17 state and regional grain and feed associations. In addition, at least 13,660 industry members had been reached through distribution of more than 247 publications, newsletter articles and special bulletins. Finally, more than 7,700 had attended Affiliated Association meetings at which audio/visual programs on explosion prevention and safety have been viewed and discussed.

One industry trade association (the Grain Elevator and Processing Society) has established a Grain Industry Safety and Health Center through which safety-related audio/visual programs and instruction manuals are developed and distributed to industry members. This association has released seven such training programs so far, dealing with such subjects as preventing explosions, and safe procedures to be followed for bin entry, locking and tagging of equipment, and walkways and work surfaces.

Individual grain firms also are highly attuned to the need for constant attention to safety in the facility. In addition to making improvements in the design and construction of newly-built and renovated facilities, grain companies spend many hours developing safety training programs, establishing preventive maintenance programs and modifying work practices to enhance safety.

The grain industry also responded positively to an overture from the National Institute for Occupational Safety and Health, when in mid-1979 NIOSH requested the National Association to participate in a project to develop a safety and health education and training program for the grain and feed industry. The project was known as the "Self-Evaluation Instrument." NIOSH officials were invited to present the project to the National's Board of Directors, which overwhelmingly approved it, in September 1979. Later that year, the National's staff telephoned the NIOSH representatives to get started on the project, only to find out that NIOSH had dropped the project entirely, without even the courtesy of giving notice to the National Association.

But the grain industry was moving ahead on its own, forging new programs and initiatives in the field of grain facility safety. In addition to the programs and activities of other associations, which I have discussed, the National Grain and Feed Association, since 1978, has conducted more than 100 meetings and distributed nearly 25 research reports and other bulletins devoted exclusively to fire and explosion safety and research.

On January 5, 1978, shortly after the series of tragic elevator explosions, the National Association issued a set of seven guidelines on industry practices that were of proven effectiveness in increasing safety in plant operations. The guidelines covered: 1) safety procedures to be followed when hot work, such as welding and cutting, was being performed; 2) safety training programs for elevator employees and all others whose work brought them into the environs of the grain facility; 3) emergency action plans; 4) the importance of good communications between management and employees; 5) preventive maintenance; 6) good housekeeping; and 7) the enforcement of no smoking and other safety rules.

These guidelines covered work practices that were known to improve safety in grain facilities. However, there also was much that was unknown about the diversity of factors that can contribute to an explosion in a grain facility. Bob Bergland, secretary of agriculture in 1978, recognized this fact when he asked the National Association to develop a set of recommendations concerning research that the government should undertake to understand the causes and ways to prevent explosions. The National responded with a set of 25 research recommendations for the government to consider funding. At the same time, the Association identified four broad subject areas to which the grain industry should devote its own capabilities in developing research projects.

There was a lack of interest in USDA to immediately fund the research recommendations of the National Association. However, the grain and feed industry moved forward on its own. On July 13, 1978, the National Grain and Feed Association established a self-help Fire and Explosion Research Program with a two-fold purpose: 1) to determine and encourage the implementation of methods known to be effective in improving safety in grain facilities; and 2) to undertake original research into the unknown causes and seek additional means for preventing fires and explosions in grain handling facilities, and share that knowledge with all who are interested. The research program is funded entirely through contributions from grain industry members: $1.4 million dollars was raised within six months of the start of the fund drive. Time, equipment, commodities and facility use have been donated by individual firms to further stretch our research dollars. The National Association has contributed the costs to administer the research program from its own budget. Total contributions to the research program represent in excess of $3 million.

The results of the research effort have been far-reaching. More than 125 research proposals have been considered since the inception of the NGFA's Fire and Explosion Research Council, comprised of the industry's top expertise in the disciplines of engineering, science, safety, operations and management. Of those 125 proposals, 35 practical research projects that hold the most potential for saving lives and property have been awarded. Twenty projects have been completed. All reports are publicly available and have been submitted for the record in this proceeding. The projects are conducted by various established domestic and international research entities, including universities, private research companies, the U.S. Department of Agriculture, and the research subsidiaries of grain companies and insurance firms. The research is centered on full-scale field tests incorporating needed basic laboratory tests. Major practical explosion prevention techniques have been discovered and implemented. A few examples:

--New design concepts for newly constructed grain facilities have been compiled and shared with the grain and other industies. Grain handling equipment and systems are being located outside the main structure, including bucket elevators, trippers, conveyors, scales and distributors.

--Venting and suppression techniques as potential options for combating explosions are being designed. A portable suppression device has been developed that extinguishes an explosion in its earliest stages before it can cause damage. For the first time, reliable data have been developed for protecting bucket elevators with vent panels that release when explosive pressures develop, thereby allowing the explosion to dissipate harmlessly into the atmosphere. Research also has begun to study ways to vent grain bins, as well as galleries and tunnels.

--Methods to redute grain dust concentrations are being examined. Research has been completed or is under way and pneumatic dust control for bucket elevators; the use of oil or water to reduce dust; the potential uses of grain dust; techniques for screening and cleaning grain; and dust explosibility.

--Methods to protect against bearing failure are being developed. One of our research projects now is developing a manual for selecting, utilizing and maintaining bearings.

The findings from our research also have shown that several factors previously thought to cause explosions present neglible hazards. For instance, it has been found that combustible gases resulting from fumigation or grain decomposition are not present in sufficient levels to pose an explosion risk. A research project conducted for the NGFA on more than 20 chemical compounds found that concentrations of gases present in grain handling facilities generally were less than 0.1 percent of the lower explosive limit.(2)

Another research project has shown that speculation over the supposed hazards of electrostatic discharges has been greatly overstated and that the characteristics of grain and the construction characteristics of facilities prevent the accumulation of charge levels under normal operating conditions.(3)

In September 1983, the NGFA's Fire and Explosion Research Council launched Stage III of the research program. Under Stage III, the remaining research efforts will be concentrated on 12 project areas that offer the most promise for yielding practical results. Many of the Stage III efforts will involve follow-up or additional research to pursue promising leads and explosion-prevention techniques discovered previously through projects awarded by the Council.

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(2) Midwest Research Institute. "A Survey of Grain Elevator Facilities for the Presence of Combustible Gases/Vapors." Kansas City, Mo., June 1980.

(3) Safety Consulting Engineers. "Electrostatic Characterization of Grain and Grain Dust." Rosemont, Ill., June 1982.

One of the most important goals of the fire and explosion research program is disseminating the information that is generated as widely as possible to all who want it. Our research reports are made available to anyone, at our cost of printing. Charges for 19 of the 20 published reports have ranged from $2.50 to $14.50. (The 20th report was a 500-page seminar proceedings book, priced at $45.)

Other information has been disseminated free of charge. For example the National Association published and distributed to all members a bulletin concerning the ways to avert dangers posed by faulty propane or natural gas lines, which have been cited as the cause of some recent explosions.(4) In a second printing, the National made 5,000 copies of the bulletin available without cost to USDA's Federal Extension Service, which distributed it to all county extension agents in the country.

Two major conferences have been conducted:

In September 1979, the NGFA conducted the first meeting of its kind to comprehensively address the many aspects of elevator design that affect safety. This original Elevator Design Conference in Kansas City, Mo., attracted a capacity audience of 425 persons, including grain industry members, representatives of elevator design, construction and equipment firms, and government officials.

The conference focused upon "state-of-the-art" design concepts and practical options available to elevator operators when remodeling or expanding existing facilities or designing and building new elevators. To extend the work of the conference, the NGFA published a 500-page book entitled A Practical Guide to Elevator Design.(5) The book, one of the best single sources of information on elevator design and safety, has been distributed worldwide, and has sold out of more than 1,500 copies. Unfortunately, however, like many of the materials to which I have referred, OSHA chose not to place these documents in the administrative record of this proceeding.

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(4) Manese, James E. National Grain and Feed Association. "Explosions Can Be Caused by Faulty Propane or Natural Gas Installations." Washington, D.C., September 1980.

(5) National Grain and Feed Association. A Practical Guide to Elevator Design. Washington, D.C., November 1979.

The knowledge that was generated by the Elevator Design Conference produced new and safer designs for grain facilities which are being adopted by the industry. Given the long, useful life of facilities, the large amounts of capital investment necessary for new construction and the industry's traditionally low profit margins, the incorporation of new design concepts must necessarily be an evolutionary, rather than a revolutionary, process. This has been the case for grain facility design and construction, as the National Association will demonstrate in its future testimony for these hearings.

Another major effort was the "Grain Dust Control" seminar conducted by the NGFA in May 1981. The seminar resulted in the publication of a 466-page book, entitled Dust Control for Grain Elevators that contains information on the most current, state-of-the-art techniques for controlling grain dust.(6) The conference led representatives of the Nebraska Governor's Explosion Task Force to report that "...industry personnel at the seminar continually emphasized that concern for safety was their number one priority....The most obvious matter observed was that the industry is making a strong effort to take care of itself with regard to grain elevator explosions and that the industry is definitely in the forefront in this area...."

In addition to the foregoing seminars and research reports, numerous technical papers and news articles have been published and speeches have been presented on the results and applicability of the research program. The highest priority has been placed on getting the safety and explosion prevention message to grain facility operators and workers through presentations to the memberships of both the National Association and the majority of the state and regional grain and feed associations.

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(6) National Grain and Feed Association. Dust Control for Grain Elevators. Washington, D.C., September, 1981.

A wide diversity of outside local, state, national and international groups also have been addressed including: the International Symposium on Grain Dusts, conducted in October 1979 at Kansas State University, of which the National Association was a co-sponsor; the National Health and Safety Symposium conducted in February 1983 by the Canadian Grain Handling Association; an International Conference on the Hazards of Industrial Explosion from Dusts, sponsored by the American Institute of Chemical Engineers; an International Symposium on Grain Elevator Explosions, sponsored by the National Academy of Sciences in July 1978; and meetings of the American Society of Agricultural Engineers, the Association of Operative Millers, and the Mill Mutuals Insurance Companies.

The industry's emphasis on disseminating new knowledge through safety education and training will break new ground this fall, when the National Grain and Feed Association conducts a conference on the practical explosion prevention techniques that have been learned through the research effort.

A few moments ago, I discussed the first Elevator Design Conference, conducted in September 1979. The tremendous leaps forward in new information concerning explosion prevention compel that this second conference be held. Entitled "Five Years of Progress...Applying New Technology for Use in Elevator Operations, Engineering, Design and Safety," it is scheduled for Sept. 27-28 in New Orleans.

The conference will emphasize the practical applications that have been discovered on ways to modify, retrofit and redesign *existing* grain handling facilities for safer and more efficient operation. New information on state-of-the-art designs for *new* construction also will be presented. Subjects to be covered at the conference will include: storage and plant layout; explosion venting and suppression; modernization and reconstruction of facilities; the elevator of the future; unique design and equipment concepts now in use or on the drawing board; horizontal and vertical conveying systems; hazard monitoring and dust control; and automation.

A prestigious panel of speakers who are experts in their fields has been assembled to address the conference. They are people and companies that have been involved in the fire and explosion research effort since its inception six years ago. They are the scientists and engineers who have been extensively involved in every phase of the various research projects, from development of the initial, original concept of the work to be done, to guiding the projects to successful completion. This conference will be a landmark event in the grain and feed industry's continuing campaign to ensure safety awareness and safety procedures among our people.

We believe that the grain and feed industry has become extremely safety-conscious over the past several years. There can be little doubt that the tragic explosions that occurred in the winter of 1977 contributed significantly to a renewed and redoubled commitment to safety on the part of everyone involved in our industry. That was a horrifying time for us and no one ever would want to experience such tragedy again. The industry's increased efforts toward safety are reflected in the industry's markedly improved safety record over the past six years. U.S. Department of Agriculture statistics show that after 1977, when there were 65 deaths attributable to grain facility explosions, there has been a sharp downward trend in lives lost: 1978 -- 5; 1979 -- 2; 1980 -- 10; 1981 -- 13; 1982 -- 12 (six of these caused by a propane gas explosion); and in 1983, no deaths. The number of explosion incidents show similar downward trends, especially from 1980 onward: 1977 -- 21; 1978 -- 12; 1979 -- 20; 1980 -- 45; 1981 -- 20; 1982 -- 14; and 1983 -- 12.

There undoubtedly are several factors that have contributed to these sharp, declines. However, we believe that increased safety awareness, improved safety procedures, and the proliferation of new knowledge concerning how to prevent or mitigate an explosion has had the largest impact in bringing about the decline in explosions and related deaths and injuries.

The industry's improved safety record has been acknowledged and commended by the U.S. Department of Agriculture. A January 13, 1984 press release, issued by USDA's grain elevator safety coordinator Joseph Cindrich, reported on the grain elevator industry's explosion rate for 1983 -- 12 explosions, 14 injuries and no death -- a "near record low." The press release states in part that:

> "Cindrich gives the grain industry much of the credit for the improved safety record. 'Many grain companies have adopted advanced technology and new elevator design or have retrofitted and modified existing facilities to combat explosions,' he said."

The grain industry is aware of its recent safety record, and equally grateful that our efforts are paying the rich dividends of fewer lives lost and fewer explosions.

The National Grain and Feed Association believes that the evidence shows that there are much more feasible and cost-effective alternatives to the OSHA-proposed standards. The industry already is actively pursuing the areas that can contribute most to safety in grain handling facilities, without governmental edict and without the exorbitant costs and technical infeasibility that are inherent in many provisions of OSHA's proposed rules. We believe that if OSHA's rules were promulgated as proposed, the net result would be ineffectiveness because they will not improve safety and they will not prevent explosions. They will detract from the positive steps already underway.

The National Association will discuss in detail the economic and technical implications of the proposed standards at the Kansas City public hearing. We will show that the grain handling facility safety standards, as proposed by OSHA, will be excessively expensive to grain firms, especially the small country elevators whose main functions are to receive grain from producers. Through its proposed standards, OSHA is endangering the existence of a major portion of this important industry segment (without placing similar controls on its main competition -- on-farm storage) and placing undue financial burdens on the rest of the industry. And the worst of it is that there is no evidence that the standards will have a significant positive impact on safety. As an executive of a large farmer cooperative, I am qualified to state that these standards will have a devastating effect on the owners/stockholders of my corporation, the farmers. My colleague, Mr. William Phillips, who represents one of the largest private grain companies in the nation, supports my sentiments concerning the cost and ineffectiveness of these standards, as proposed.

The National Association commissioned an independent economic impact and technical feasibility study of OSHA's proposed standards, the results of which will be presented in detail at the Kansas City public hearing. To give you an overview of the results here, our analyses have shown that OSHA in its regulatory impact assessment, and Booz-Allen and A.D. Little in their studies of the cost impacts of the standard, have all greatly understated the cost to our industry.

The Booz-Allen analysis said that the annualized cost for a standard containing the 1/8th-inch action level requirement would be over $113 million. The net present value needed to support this annualized cost over the next 10 years would be nearly $700 million. However, our analysis, conducted by GEMCI/MRI, indicates an annualized cost of approximately $240 million, requiring a net present value of almost $1.5 billion to finance the implementation of the proposed standard over the next 10 years. I hasten to point out that we believe our analysis is extremely conservative and that it also understates the actual cost of these standards.

Likewise, our analysis of the benefit assessments performed by and for OSHA indicate that the benefits of the proposed standard have been greatly overestimated. Booz-Allen estimated annualized benefits ranging from $212 million to $300 million. Our analysis indicates that these benefits have been overstated by more than a factor of 10.

Contrary to the methodology utilized by OSHA and its consultants, the National Association's impact study relied on a number of resources, the very foundation of which is a comprehensive, statistical survey administered to all segments of our industry. On-site field surveys were conducted on 38 grain facilities and over 800 written survey responses were received and analyzed in detail to formulate the basis of current industry practices and the assessment of costs to meet the standards.

The National Association also has some severe technical concerns with the proposed standards, which will be discussed thoroughly in Kansas City. Briefly, these are:

1. Housekeeping. The requirement to minimize both airborne and layered dust will effectively negate adoption of one of the three so-called options offered because the only way to achieve this requirement would be to implement both the sweeping and pneumatic dust control options. Concerning the 1/8th inch action level "option," there is no scientific evidence to support that particular level. In addition, by placing undue emphasis on only one of the four elements of the explosion phenomenon -- the fuel -- OSHA is diverting attention away from other, effective safety techniques.

2. Bucket Elevators. It is our position that several of the proposed rules for inside bucket elevators are not necessary. Special grounding is not needed because there is no evidence to indicate that static electricity has been a problem in bucket elevators. The requirements for inspection doors are overly restrictive -- any access that permits inspection should be allowed. Motion

switch interlocking devices for conveyor shutdown are impractical and potentially unsafe for non-automated facilities. In addition, OSHA's definition of "partially inside bucket elevators" is so restrictive that it would exclude most outside bucket elevators that have been designed and constructed specifically for their inherent safety features.

3. Emergency Escape. OSHA already adequately regulates emergency escape from grain handling facilities under its General Industry Standards. In many cases, physical limitations at grain facilities would preclude compliance with the rules as OSHA has proposed them.

4. Bin Entry. The National Association believes that grain facility operators are very capable of judging which bins need entry permit systems and other precautions. Many bins connected with grain facilites, for example, flat storage and large diameter steel or concrete bins with ground-level entry, present no entry hazards.

5. Grates. OSHA's proposed requirement that grates be limited in length and width openings to 2.5 inches is based on opinion and conjecture. Grate openings of that size actually could impede the flow of some types of grain.

As I said, our technical and economic concerns, and other issues, will be addressed in detail in Kansas City. At the Minneapolis hearing, the National Association will give a detailed, in-depth audio/visual presentation of the research that has been undertaken in the Fire and Explosion Research Program. We will present still slides and films of the important research that has been done on venting of bucket elevators, galleries and bins, explosion suppression devices, and other research areas.

We will reserve our testimony in Dallas for a summation of our position on the OSHA-proposed standards and to comment on any new issues that may arise in the course of these hearings.

NATIONAL
GRAIN & FEED
ASSOCIATION

Testimony

of

Dr. Kendell W. Keith
National Grain and Feed Association

before the

Occupational Safety & Health Administration

Hearing on

Safety Standards on Grain Handling Facilities

Kansas City, Missouri

June 1984

I am Kendell Keith, Secretary-Treasurer and Director of Economics of the National Grain and Feed Association. We have reviewed and analyzed the Booz-Allen analyses of the benefits of the proposed OSHA standards.* In our view, there are a variety of shortcomings with the study. Many parts of the analysis are based upon faulty assumptions. Booz-Allen has misinterpreted the results of a Canadian fire study and inappropriately applied the results to U.S. facilities. And in general, Booz-Allen has refused to recognize the obvious trends in recent data which demonstrate the grain handling industry's record of self-improvement in the area of safety.

The Booz-Allen analysis of baseline risks and the subsequent benefits of the proposed standards is logically divided into three parts: 1) risks from

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*This statement is based upon a preliminary review of the A. D. Little and Booz-Allen benefits assessments on the standard. Based upon further analysis which will be contained in our final report to OSHA, some slight modifications in the results reported in this testimony might be necessary.

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fires; 2) risks from explosions; and 3) risks of accidents and injuries from other causes. I will take each section of the Booz-Allen analysis in turn, and explain the problems and how they can be corrected.

The Risk of Fires

Booz-Allen estimates the total number of grain industry fires, based upon current conditions at 2,661 fires annually. Of these total fires, Booz-Allen states that 50 are major fires, causing average damage of $673,090 each. The remaining 2,611 fires occurring annually are assumed to cause an average damage of $12,485. Fires in the industry are estimated to cause 3.6 deaths and 1,081 injuries annually. Total annual society loss due to fires is estimated at $148.2 million.

A primary problem with Booz-Allen's analysis of the incidence of fires is that it is based upon some very old data. To obtain the estimate of 2,661 annual fires, Booz-Allen used National Fire Protection Association data averaged over the years 1958 through 1975.

Using the same data, A. D. Little estimated expected annual fires at 2,200. It could be argued that, on the basis of declining injury rates in the industry, any estimate based upon data this old or outdated probably overstates fire risk. In fact, if the rate of fire occurrence declined at the same rate since 1975 as general workplace injuries within the industry, a more realistic number might be 1,600 to 1,800 annual fires. In addition, safety experts within our industry have raised questions on the accuracy and applicability of this data to our industry. In our analysis, we use the A. D. Little estimate of 2,200 fires, for purposes of evaluating and comparing the benefit assessments prepared for OSHA by A. D. Little and Booz-Allen. But in doing so, it should be recognized that this figure very likely contains considerable upward bias.

Booz-Allen estimated the annual number of major industry fires by extrapolating from available data reported by NFPA. Over the 1976-1981 period, NFPA data included an average of 11 major fires annually. A. D. Little took this figure and multiplied it by a factor of 5 because NFPA underreported total explosions by a factor of 5. The fallacy of this, as pointed out by Office of Management and Budget[1], is that NFPA data include a very high percentage of both major explosions and fires, because they are based on newspaper accounts which tend to give good coverage to such events.

Booz-Allen took the analysis one step further by estimating fire risk for Canadian elevators. Apparently Booz-Allen was unaware that the great majority of Canadian elevators are wooden construction compared with concrete and steel in the U.S. Wood construction greatly enhances the risk of major fires and makes the Canadian study a totally inappropriate measure of U.S. fire risk. We agree with OMB that the degree of NFPA underreporting of explosion deaths and injuries is a more appropriate measure to expand the NFPA data. Doing this results in an estimated 12 to 23 annual major industry fires compared to the 50 estimated by Booz-Allen.

On injuries associated with fires, Booz-Allen makes an arbitrary assumption, saying that the cause of injury in small fires is one half that of injury caused by major fires. In our analysis, we have shown that while good data is not available on injuries in small fires, it is possible to demonstrate that the severity of fires, as measured by economic loss, is positively correlated with the expected injury rate. That is, the greater the economic loss, the greater the risk of injury. Using regression analysis, we have estimated that injury frequency associated with minor fires is .24 injuries per fire rather than .4 injuries assumed by Booz-Allen. This erroneous assumption alone, results in exaggerated risk of injury from small fires by 67% $\frac{(.40 - .24)}{.24} = .67$.

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[1] Office of Management and Budget, "OSHA's Proposed Standards For Grain Handling Facilities," April 1984.

In assessing the cost of lost lives, Booz-Allen used an estimated value of life of $3.5 million. While it is very difficult to place monetary value on life, it must be recognized that the assumed value of life has a critical impact on the estimated baseline risks and estimated benefits. This $3.5 million valuation should be recognized as one of the highest estimates available in economic literature. A. D. Little referenced several studies on this issue and eventually settled on a value of $800,000, the same value used by the Consumer Product Safety Commission. Without saying which estimate of the value of life is right or wrong, we have analyzed how the results are affected by a more conservative estimate of the value of life -- $1 million -- and the higher value of $3.5 million used by Booz-Allen.

A similar approach was taken in the valuation of temporary injuries which Booz-Allen valued at $34,100. There are reputable research studies available that place the estimated cost of temporary injuries at $20,000 to $30,000[2]. To determine how the different valuations affect results, we analyzed the benefits using both the $34,100 used by Booz-Allen and the lower estimate of $25,000, representing the midpoint of the range suggested by Viscusi.

After correcting for the above-stated problems with the assessment of fire risks in the industry, we estimate that the annual risk of death from fires is in a range of 0.9 to 1.7 deaths per year, compared to Booz-Allen's assessment of 3.6 deaths annually.

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[2] Viscusi, W. K., Risk By Choice: Regulating Health and Safety in the Workplace, Cambridge, Mass., Harvard University Press, 1983.

We estimate the value of total baseline loss to society due to fires to be in a range of $49.6 million to $67.5 million annually. This compares with Booz-Allen's estimate of $148.2 million.

Explosions

The most severe problem with Booz-Allen's assessment of explosion risks is the selective use of the analysis period to estimate average risk, which exaggerates explosion risks of more recent years and ignores the record of improved safety the industry has achieved. Booz-Allen's misapplication of the explosion data is best exemplified by their estimated death risk from explosions. Based upon 1976-1983 average, Booz-Allen estimated that 16.4 deaths due to explosions should be expected every year. However, in reviewing the most recent data concerning the six years from 1978 to 1983, deaths due to explosions have not reached this level in any year, and the average rate of deaths over the six years is 7.3. In our analysis, we demonostrate a more appropriate application of the data using averages and trend analysis of the most recent six-year period. In doing so, we have estimated the risk of explosions in a range of 12.6 to 23.5 per year, compared to Booz-Allen's estimate of 24.3. We estimate the risk of fatalities to be in a range of 6.3 to 7.3 per year compared to Booz-Allen's estimate of 16.4. In terms of the annual baseline economic loss to society, we estimate the loss due to explosions to be in a range of $36.5 million to $79.1 million. This compares with Booz-Allen's estimate of $141.9 million.

Baseline Risks from Other Causes

In analyzing fatalities in the industry caused by factors other than fires and explosions, Booz-Allen again extrapolates from available data. However, this extrapolation involves a misuse and misinterpretation of data as demonstrated by OMB's analysis. The inappropriate expansion of the data results in Booz-Allen overstating the risk of fatalities by more than double the actual rate. Correcting for the bias noted by OMB, we calculated a potential range in baseline risk. This range does not represent uncertainty on our part, but rather demonstrates that two reasonable estimates of fatality rates, that are remarkably close to each other, may be generated using two different avenues of logic. From this approach, we estimate fatality risk from causes other than fires and explosions between 19.5 and 21.0 fatalities per year. This compares with Booz-Allen's estimate of 43.5 fatalities per year.

Booz-Allen's assessment of other workplace injuries estimates 11,524 injuries annually from causes other than fires and explosions. Our analysis of their methodology used in arriving at this figure, demonstrates four reasons why the number is an overstatement of actual risks: 1) Booz-Allen failed to include 1982 BLS data which was available at the time of their study and this 1982 figure is considerably lower than previous years; 2) Booz-Allen used an estimate of the ratio of injuries in grain elevators to grain mill products based on 1974-76 data, and recent trends indicate this leads to an overstatement of risks in grain elevators; 3) Booz-Allen used estimates of the total workforce in the industry based upon 1977 Census of Manufactures data, which are judged to be considerably higher than current levels indicated by our survey of 812 grain handling facilities; and 4) Booz-Allen failed to account for the declining trend in injury rates for the grain industry.

Our analysis shows further that Booz-Allen's selection of BLS injury data demonstrates a higher injury risk within the grain industry than a complete review of this data would support. Our analysis reviews and compares more complete BLS injury data on ten different industry segments for the years 1975 to 1982. Looking at this complete data, we conclude that the best available evidence indicates the grain industry injury rates are generally lower than other comparable industry categories. In addition, the data show the grain handling industry has demonstrated a declining trend in both total injuries and lost workday injury incidents, over the most recent eight year period. It should be emphasized that declining trends in both categories of injuries were not found in other major industry segments analyzed.

By correcting for the errors in Booz-Allen's analysis, we estimated baseline actual total lost workday injuries to be in a range of 8,748 to 8,772 annually. This compares with Booz-Allen's estimate of 11,524 injuries annually.

After making all the adjustments indicated above, we estimated total baseline economic risks from hazards other than fires and explosions to be in a range of 238.2 million to $372.6 million annually compared to Booz-Allen's estimate of $545.2 million.

In summary, the following table compares our analysis of baseline risks to Booz-Allen's assessment in terms of both economic losses and annual expected workplace deaths.

Summary of Annual Baseline Risk Assessment

	Estimated By Booz-Allen		Estimated by NGFA	
	Economic Loss (million $)	Deaths	Economic Loss (million $)	Deaths
Fires	$148.2	3.6	$ 49.6 - 67.5	0.9 - 1.7
Explosions	141.9	16.4	36.5 - 79.1	6.3 - 7.3
Other Risks	545.2	43.3	238.2 - 372.6	19.5 - 21.0
Total	$835.3	63.3	$324.2 - 519.2	26.7 - 30.0

In total, we calculate that Booz-Allen overstated baseline economic risks by at least 61 percent and potentially by as much as 158 percent. In addition, Booz-Allen's analysis overstates the risk of deaths from all causes by more than double.

Benefits of the Standard

Using their baseline risk assessment, Booz-Allen proceeded to estimate the benefits of the standard assuming extremely high levels of effectiveness. For example, they assumed that the standard would prevent 100 percent of bin suffocation deaths. Booz-Allen also estimates that over 70 precent of fires and explosion losses would be prevented by the proposed standards. Using these assumptions and the estimated baseline risks, Booz-Allen estimates total annualized benefits of the standard to be $212.5 million to $301.5 million, depending on the method of dust control.

OMB's analysis[3] of A. D. Little's methodology, which is very similar to that employed by Booz-Allen, is highly critical of the assumptions of such high levels of effectiveness. OMB states, "Any projection of the effectiveness of a new OSHA safety standard must begin with the realization that OSHA's existing safety rules (aimed presumably at the most serious safety problems) have had very little and perhaps no effect on occupational accident rates."

OMB states further, "To date, no careful assessment of OSHA safety programs has found effectiveness rates even one tenth as high as ADL and OSHA have assumed for the grain handling standards."

Using OMB's review of economic literature on the general effectiveness of industry safety standards, at the absolute maximum, the safety standard would result in annual benefits of $30.2 million (10% of $301.5 million). However, making this adjustment in estimated benefits only corrects for the bias caused by an overstatement in effectiveness. Considering also the evidence we have presented that the baseline risks were also overstated by a large factor, the standards could most likely result in maximum amount of benefits in a range of

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[3] Viscusi, W. K., Risk By Choice: Regulating Health and Safety in the Workplace, Cambridge, Mass., Harvard University Press, 1983.

$11.7 million to $18.8 million and prevent potentially 2 to 3 fatalities annually in the grain handling industry.[4]

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[4] To correct for the overstatement of the baseline risks, the following calculations were made ($324.2 million/$835.3 million) x $30.2 million and ($519.2 million/$835.3 million) x $30.2 million. The figures, $324.2 million and $519.2 million, are the NGFA's estimates of the range in potential baseline risk. The estimate of the 2-3 fatalities prevented was made by applying an assumed maximum 7-10 percent overall effectiveness to baseline risk of 26.7 to 30.0 deaths per year.

NATIONAL
GRAIN & FEED
ASSOCIATION

Testimony

of

William E. Phillips
National Grain and Feed Association
Safety Subcommittee Chairman

before the

Occupational Safety and Health Administration

Hearing on

Safety Standards for Grain Handling Facilities
Kansas City, Missouri

June, 1984

I am William E. Phillips, assistant vice president of loss prevention and security for Continental Grain Company. I present my remarks today on behalf of the National Grain and Feed Association as a part of this panel to discuss technical issues in the proposed standard. Sharing this panel with me are Mr. Gary Barnett, manager of safety and health for Nabisco Brands, Inc. and Ms. Lynn Pollan, assistant counsel with Bunge Corporation. Our testimony will discuss major provisions of the proposed grain handling standards that pose the most serious problems for the grain handling industry. NGFA on June 8 submitted detailed comments on each provision of the standard in response to OSHA's January 6, 1984 proposal. Upon completion of our oral comments we will respond to questions.

The National Grain and Feed Association is a voluntary association of grain and feed firms ranging in size from the smallest country elevator to the largest

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grain and feed complex. Included in our membership are the owners and operators of every type of facility that would be affected by the proposed safety standards -- country and terminal elevators, waterway facilities, export elevators, feed mills, and processors of grain and its by-products. The association's membership is comprised of 1,300 companies and 47 affiliated state and regional grain and feed associations that include more than 10,000 grain and feed companies nationwide.

NGFA's basic position is that voluntary safety programs are the most effective means of achieving safety. During the past several years, our industry has initiated extensive education and training programs to disseminate information on proven methods of providing safer work places. This association, through its Fire and Explosion Research Council, has undertaken a comprehensive research effort to discover new methods to prevent fires and explosions in grain facilities. We believe that these efforts reflect an unprecedented commitment by the grain industry to reduce fires and explosions. Therefore, we remain unconvinced that this OSHA rulemaking effort will result in substantial safety improvements over those already being achieved by the industry through voluntary efforts.

I will address two significant requirements of the proposed standards: the "housekeeping" and the "emergency escape" provisions. My remarks will focus on the safety-related issues and technical aspects of these provisions.

HOUSEKEEPING AND DUST CONTROL

Housekeeping, which consists of removal of layered dust accumulations and reduction of airborne dust generation, is an ongoing part of operating grain facilities for many reasons, including safety, health, environmental air quality, product loss control and sanitation. Our industry recognizes housekeeping as an important component of an overall safety program. However, we believe the proposed housekeeping provisions, because they are vague, misdirected, and present compliance difficulties, will not provide the level of safety benefits claimed.

The housekeeping provisions of the proposed standards are technically infeasible. In addition, they have the single largest cost impact of the standards on the industry and will not significantly enhance safety. The National recommends that these requirements be revised and redirected to provide a true performance guideline which will promote safety.

A 1/8th Inch Action Level Will Not Significantly Enhance Safety

First, OSHA continues to place an undue emphasis and reliance upon minimizing dust as "the most effective and fundamental means of reducing the number of dust fires and explosions." On the contrary, housekeeping addresses only one of the four explosion elements -- the fuel. A research project sponsored by the National Grain and Feed Association's Fire and Explosion Research Council found that even when extensive efforts are made to clean or remove dust from grain prior to handling in bucket elevators that explosive levels of grain dust can recur each subsequent time grain is handled.

An earlier research project, conducted by Cargill, Inc. for USDA, examined several methods to reduce dust concentrations in bucket elevators. Previous research had indicated that bucket elevators frequently have explosible concentrations. Wade and Hawk, "Investigation to Determine Dust Concentrations and Characteristics Inside Enclosed Work Areas and Equipment," Department of Agriculture, 1979. Grain, which was cleaned by aspiration or screening before initial handling in a bucket elevator, exhibited dust concentrations in excess of 40 grams per cubic meter upon subsequent handling. Therefore, even when grain was extensively cleaned, new dust generation and liberation occurred upon subsequent handling. This study demonstrates that grain dust is an inherent part of grain and grain handling. The only known way to completely avoid grain dust is to not handle or move grain.

Another research project performed for the NGFA by Factory Mutual Research Corporation entitled "Dust Explosion Propagation in Simulated Grain Conveyor Galleries" found that as little as 1/100th of an inch of grain dust is sufficient to fuel the spread of a flame front. The report states: "The experiments in the large-scale facility essentially reconfirmed the fact that low values of dust loadings are capable to support flame propagation in an elongated structure. In this case, flames were observed to reach to the open end of the gallery for nominal fuel concentrations of 77 grams per cubic meter, corresponding to a layer of cornstarch 1/100th-inch thick." These full scale tests, in a 8 feet by 8 feet in cross section and 80 feet long gallery structure, clearly demonstrated the fallacy of relying on housekeeping as the sole or prime means to reduce explosion risks. Clearly a 1/100th-inch action level is not obtainable or practicable in an operating facility, therefore, too much reliance on housekeeping or dust control would be a mistake. Rather, we believe that a more balanced approach which addresses all elements of an explosion is more prudent.

As demonstrated by this scientific data, grain dust -- the fuel of fires and explosions -- cannot be totally eliminated or minimized to the extent necessary to ensure that the propagation of an explosion will not occur. OSHA's mistaken preoccupation with "minimizing" this single explosion element could have the opposite of its intended effect; that is, it could lead to a false sense of security in grain handling facilities by overly emphasizing housekeeping, when it provides only questionable safety benefits.

There are many factors that influence the characteristics of a dust explosion. Some of these which directly relate to the fuel -- grain dust -- include the strength of the primary explosion; facility design; the amount and condition (moisture, compaction and agglomeration) of the dust available to fuel the explosion or flame front; the intensity of the ignition source; and the presence of suspended dust concentrations. OSHA's housekeeping proposal only accounts for the amount of fuel present in layers or airborne concentrations. Controlling this factor will not necessarily decrease the incidence of or lessen the extent of dust explosions.

There is No Scientific Basis for OSHA's 1/8th-Inch Action Level

Second, OSHA cannot justify through any research or scientific evidence the establishment of a 1/8th-inch "action level" for fugitive grain dust. As stated earlier, research has shown that a dust layer of as little as 1/100th of an inch of grain dust is sufficient to fuel an explosion. The Factory Mutual research report indicated that less than 62% of the 1/100th-inch dust layer was "picked up" from the gallery floor. Only a fraction of the dust "picked up" actually was involved in the flame combustion process of the gallery explosion test. This data suggests that a fraction of 1/100th of an inch of dust can fuel a flame front. When obstacles were placed in the gallery, large amounts of dust were "picked up", suggesting even smaller dust layer thicknesses would be sufficient to fuel the combustion process. Obviously, these minute dust layers cannot be avoided in operating grain facilities. OSHA, therefore, arbitrarily selected this 1/8th-inch level, basing it upon unsubstantiated opinions. This action level will not prevent or necessarily lessen the effects of an explosion or fire.

OSHA itself admits in its proposal that it:

> "does not believe that any level of dust accumulations can be considered completely safe. However, OSHA also realizes it is not feasible, and may be impossible, to remove all dust accumulations at all times."

We agree with this statement. Housekeeping cannot be a continuous process; nor can elevator operators be shut down every time a 1/8th-inch level occurs due to spillings or dust. On the basis of the National Grain and Feed Association's technical analysis, Fire and Explosion Research data, and economic study, we have concluded that the industry cannot feasibly comply with OSHA's proposed 1/8th-inch action level. Further, any effort to reduce the action level would not effectively lessen explosion risks but would increase the already staggering costs of housekeeping.

OSHA's Proposal Provides No Options

Third, despite statements to the contrary, OSHA's proposed standards do not provide options for employers to meet the housekeeping standard since it requires them to minimize both airborne and layered dust within their facilities. In the preamble to the proposed standards, OSHA states:

> "The housekeeping program must specify the methods which will be used to control airborne dust emissions, as well as the frequency and methods which will be used to remove dust accumulations." (emphasis added.)

This suggests that the housekeeping "options" contained in the proposed standards (i.e., sweeping once per shift or utilizing pneumatic dust control) are not options at all. Selecting one of these options would not eliminate a facility's obligation to meet the OSHA-proposed 1/8th-inch dust action level, unless dust control systems also were utilized to control airborne emissions and to prevent dust accumulations. Further, a 1/8th-inch grain dust level easily could be exceeded unknowingly in a facility in a short time, even if the plant were equipped with extensive pneumatic dust control systems. Thus, the only way to meet the housekeeping provisions would be to implemement both the sweeping and pneumatic dust control "options."

This is conceded by OSHA because every economic analysis that OSHA or its consultants has performed assumed that both dust control and sweeping would be required to meet the 1/8th-inch action level. The OSHA Regulatory Impact Analysis itself states that "manual housekeeping alone may not be sufficient to control dust at the level required." Thus, it is misleading for OSHA to suggest that sweeping alone is a viable option under the proposed rule.

Sweeping once a shift, if an option at all, would mandate the employment of additional personnel at all facilities, which would greatly increase operating costs. This option could be even more costly than the 1/8th-inch action level option on an annualized basis, since a greater degree of cleaning activity would be required than under the action level criteria.

Additionally, slower handling grain handling facilities or those with dust control means such as enclosed equipment may not need to sweep even once per shift to meet the 1/8th-inch action level. Therefore, the selection of the once per shift sweeping option could result in unnecessary cleaning efforts.

Another major problem in the housekeeping provision is OSHA's statement that dust control systems would be required to achieve "zero visible emissions." Presumably, this means that no airborne dust concentrations or dust layers would be permitted under the pneumatic dust control "option" -- a totally impractical and impossible-to-achieve requirement.

Housekeeping Requirements are Vague

Fourth, OSHA's 1/8th-inch dust action level option is vague. Only minimal guidelines are given as to how the dust layer thickness is to be determined. Further, the provision does not require that the floor area must be contiguous so that various small floor areas could not be selected and totaled to distort a dust layer average. A single area exceeding 1/8th-inch could subject the employer to a citation.

Housekeeping Options are not Cost-Effective

We believe there are more cost-effective and realistic alternatives to the OSHA proposal that will not put large numbers of facilities out of business.

The housekeeping provisions are the most costly in the standards. The preliminary results of the National Grain and Feed Association's economic impact survey indicate that OSHA's projected costs for housekeeping are greatly underestimated. In its various economic impact studies, OSHA's consultants estimate the cost of the proposed housekeeping provisions alone would be between

$56 million and $950 million. The economic impact study conducted by Arthur D. Little, Inc. for OSHA found that the cost of adopting an even more stringent grain dust "action level" of 1/64th-inch -- which has been advocated by some -- would cost the industry $5.8 billion.

Booz-Allen's study of the cost impacts of the proposed OSHA standard on grain handling facilities indicates annualized cost as being over $113 million to meet the 1/8th-inch dust criteria and $56 million to meet a once per shift sweeping option. However, the economic study completed by GEMCI-MRI for the National Grain and Feed Association shows that the annualized housekeeping cost will exceed $200 million.

All segments of the industry will be severely affected by these provisions. Small facilities will be hardest hit. We agree with OSHA's assessment that the proposed housekeeping standards will increase the demand for labor. We believe that additional labor would be required for small country elevators even during the off season (non-harvest). ADL's economic study conducted for OSHA showed that "the average country elevator and small feed mill could suffer declines in profitability of 69% respectively...other grain elevator and storage facilities could experience a 9% to 14% decline in profitability, if unable to increase revenues." The preamble to the standards states that revenues would need to increase from 1% to 3% to cover the cost of compliance for small firms. On the basis of our economic study, these amounts are understated.

Redirecting Housekeeping Provisions

The National Grain and Feed Association believes that OSHA's housekeeping proposal must be directed, if it is to be cost-effective in improving safety. The NGFA opposes the establishment of arbitrary housekeeping criteria, including the three so-called housekeeping "options" proposed by OSHA. On the other hand, we agree that grain handling facilities should develop and implement a written housekeeping program that specifies the areas and frequency of checking and cleaning by using sweeping, dust control or a combination of methods to reduce dust accumulations.

Because the location of the layered dust plays a role in the propagation of an explosion, a housekeeping program could identify the need for more frequent housekeeping near potential ignition sources or areas adjacent to operating machinery. Attention could be directed towards dust accumulation on equipment which has the greatest potential for overheating or malfunctions or towards dust accumulations in areas around and adjacent to bucket elevators, enclosed conveyors, etc. Housekeeping schedules established by facility management for these and other areas could be substituted for a specific dust level.

The National recommends that changes be made in the housekeeping provisions. Otherwise, the very survival of small facilities is jeopardized. The development and implementation of a written housekeeping program which specifies the areas and frequency that areas will be checked and/or cleaned, and which specifies dust control and cleaning methods to be used to reduce dust accumulations on floors, equipment and other horizontal surfaces is appropriate, however, for all.

EMERGENCY ESCAPE

I will comment briefly on the emergency escape provision of the proposed standard. Ms. Pollan will give further comments on these requirements. The emergency escape provision of the proposed standard places an unnessary burden upon our industry. However, we endorse the concept that each facility have an emergency action plan. The requirement under (d) emergency action plan incorporates by reference section 1910.38(a) of the general industry standards, which requires that the plan include "emergency escape route assignments." In contrast, OSHA's proposed emergency escape provision for grain handling facilities inappropriately calls for the addition of exits to many existing tunnels, galleries and headhouse scale floors. Most of these areas are not normal work stations for employees in most facilities; and do not need additional exits for escape purposes. A requirement to have two separated exits or egress paths from all paths of a facility that an employee may have to pass through, or be present in for short time periods, is impractical and will not provide the safety benefit being sought.

OSHA already regulates emergency egress from grain handling facilities under section 1910.35-37 of the general industry standards. These standards describe the minimum criteria emergency exits must satisfy, and are based on factors such as size, arrangement and occupancy of the building. Section 1910.36(b)(6) only requires two means of egress if "the reasonable safety of numbers of occupants may be endangered by the blocking of any single means of egress due to fire or smoke...."

OSHA's proposal deviates from, and expands upon these regulations, by requiring two separately located emergency exits in specific facility areas.

No longer would employers be permitted to provide emergency exits based upon a facility's size, occupancy and arrangement. Rather, every tunnel, gallery and scale floor would be required to have two exits.

Requiring at least two exits "from tunnels, galleries, scale floors and work areas" will not enhance safety at grain handling facilities for several reasons. The structural limitations of most facilities would preclude the required separation of emergency exits, therefore, no additional employee protection would be achieved. For example, most headhouses are of limited size and floor space, therefore, two emergency exits would have to be in close proximity to one another. As a practical matter, an emergency event, such as a fire or explosion, would prevent access to both exits. Illustrative of this point is a 1983 research project sponsored by NGFA which concluded that the flame front of an explosion can travel down a tunnel or gallery at a rate of 250 feet per second. Finally, the structural integrity of many facilities would be undermined if additional exits had to be installed.

The economic analysis conducted for the National by GEMCI-MKI indicates that the emergency escape provision will cost the industry a minimum of over $18 million which includes an $11 million cost for tunnel exits and over $7 million for adding exits and escapes from headhouse areas. The cost for an affected facility will be prohibitive in many cases. OSHA's economic consultants inexplicably estimated a zero cost for this provision of the standard.

Existing regulations in the general industry standards adequately regulate emergency egress in grain handling facilities. NGFA, therefore, recommends that OSHA delete this provision from the proposed standard.

NATIONAL
GRAIN & FEED
ASSOCIATION

Testimony

of

Lynn E. Pollan, Esquire
National Grain and Feed Association
Safety and Health Committee

before the

Occupational Safety and Health Administration

Hearing on

Safety Standards for Grain Handling Facilities

My name is Lynn E. Pollan. I am assistant counsel of Bunge Corporation. As assistant counsel, I review all regulations implementing the OSH Act and provide legal advice to Bunge's corporate and field managers on the requirements of OSHA's standards. I appear today on behalf of the National Grain and Feed Association ("NGFA"), for which I serve as a member of the Safety and Health Committee. My testimony will highlight the legal aspects of compliance problems that grain industry employers will face if OSHA's proposed grain handling standard is adopted in its present form.

Briefly, the proposal is seriously flawed principally due to requirements which are vague, unachievable and overlap existing OSHA general industry and marine terminal standards. Not only will employers be faced with implementing a patchwork of regulations for their inland and waterside facilities, but also OSHA inspectors will be charged with enforcing these confusing standards. This type of regulatory program does not promote safety, but fosters uncertainty in the law and noncompliance.

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The following discussion highlights the most significant legal problems with the proposed standard that NGFA has identified as well as portions of the standard not discussed by Mr. Phillips:

(a) Scope

OSHA proposes to include all grain handling facilities within the scope of its standard, including all inland and marine terminal facilities. Thus, marine grain handling facilities would be covered by not only the grain handling standard (§1910.272), but also OSHA's marine terminal standard (Part 1917) as well as many provisions of the general industry standards (Part 1910). See § 1917.1(a)(2). These inconsistent and overlapping regulations will create confusion and make compliance and enforcement extremely difficult. Grain companies owning waterside and inland facilities will have to adopt different and supplemental safety and training programs on the basis of a grain facility's location, despite the identical nature of the operations at water and inland grain handling facilities.

The marine terminal standard contains a variety of requirements addressing numerous types of industries that operate along coastal or inland waterways. Currently, grain facilities that load or unload waterborne vessels are subject to these requirements, although the regulations do not address specifically the equipment, operations or potential hazards at grain facilities. Because the marine terminal standard attempts to address many industries and operations, the standard contains ambiguities and compliance problems for the grain industry. In addition to these problem areas, which forced the industry to seek administrative and judicial relief, OSHA now proposes to incorporate the proposed grain handling standard into the marine terminal standard.

Grain handling facilities, therefore, would be subject to one vertical standard (marine terminal), as well as parts of the general industry and grain handling standards.

OSHA does not impose this onerous burden on any other industry. Such duplicative regulation is plainly inconsistent with the purposes and policies of the OSH Act. Section 4(b)(1) of the Act specifically seeks to avoid duplicative and inconsistent regulation by prohibiting OSHA from issuing regulations in an area in which another federal agency has issued regulations. These same considerations apply with even greater force where, as here, the duplicative and inconsistent regulations emanate from OSHA.

Accordingly, NGFA recommends that OSHA exempt marine grain handling facilities from coverage under OSHA's marine terminal standard.

(c) Definitions

Several definitions are unnecessarily vague and will create serious compliance burdens for all grain handling facilities. Specifically, the definition of "acute debilitating health effects" is susceptible of different meanings, especially since it refers to "health effects resulting from toxic agents," which are not defined in the standard. NGFA recommends that "acute debilitating health effects" be deleted from the definitions section, as it will only create added compliance difficulties for grain handling facilities trying to implement workable and common sense but strict requirements.

Similarly, OSHA's definition of "fugitive grain dust" encompasses dust particles of a size that typically would not be considered fugitive. For example, certain grain meal spills would be included within this definition. These spills do not create a fire or explosion hazard. NGFA recommends that this definition also be deleted from the proposed standard.

Finally, the "small elevator facility" definition should be changed to encompass all small facilities including elevators, feed mills or any other grain handling facility. This change is needed so that the definition can be used as a basis for granting exemptions and time extensions for smaller facilities to meet various provisions of the proposed rules.

The definition should not include temporary storage as a part of the capacity. Temporary grain storage outside the permanent grain handling structure does not present an explosion risk and, therefore, should not be considered a part of a facility's permanent storage capacity.

(d) Emergency Action Plan

NGFA supports the concept of emergency planning. Emergency planning promotes safety and should be an integral part of employee education and training. OSHA, however, refers to section 1910.38(a) of the general industry standards for developing and implementing such a plan. Rather than incorporating this provision by reference, thereby creating uncertainty as to whether other portions of section 1910.38 apply, OSHA should expressly state the required elements of an emergency action plan for grain handling facilities.

(e) Training

NGFA has been a strong advocate of implementing employee training and education programs to aid in hazard recognition and to avoid accidents and injuries related to human error. Training is a proven and effective means of achieving safer grain handling operations.

Nevertheless, the use of "shall assure" in this paragraph and elsewhere in the standard places an onerous standard on employers, an apparent strict liability standard not imposed by the OSH Act. See National Realty and Construction Co., Inc., 489 F.2d 1257 (D.C. Cir. 1973). Subparagraph (e)(1) should be revised to delete the "shall assure" language to simply state: "The employer shall provide training to employees at least annually...." Subparagraph (e)(2) similarly should be revised to state: "The employer shall provide training to employees who are assigned special tasks...." The employer cannot ensure that employees, once given training, will handle materials and perform work tasks as instructed.

From OSHA's "Summary and Explanation of the Proposal," Appendix A and the language of subparagraph (e)(1)(i), it is evident that OSHA intended the training requirements to address only safety hazards associated with an employee's work tasks. The language of subparagraph (e)(1)(ii) departs from that intent, however, and requires that every employee in a grain handling facility be trained in the procedures and practices which are listed whether or not the employee will ever have occasion to apply such training. We recommend that OSHA revise this provision to require employee training only if it is associated with an employee's work tasks.

(g) Entry into bins, silos and tanks

Once again, OSHA uses "the employer shall assure" language in this provision of the standard, thus, imposing a higher standard of liability on employers than can reasonably be expected. Employers cannot assure specific employee conduct, but rather must depend upon education, training and a joint commitment to safety. NGFA, therefore, recommends that "shall assure" be deleted from this section of the standard.

Subparagraph (g)(1)(ii) prescribes testing for the presence of combustible gases, vapors, toxic agents and sufficient oxygen. No single monitoring device exists, however, that will give elevator operators a reading for every potential toxic agent, combustible gas or vapor and oxygen deficiency. This is significant because subparagraph (g)(1)(iii) does not contain a "reason to believe" limitation on the employer's responsibility to test for such agents and substances. Accordingly, subparagraphs (g)(1)(ii) and (iii) should be combined.

Additionally, the "reason to believe" criterion in subparagraph (g)(1)(ii) needs to be modified to refer to the employer's belief, not the belief of third parties.

The requirement that an employee trained in cardio-pulmonary resuscitation ("CPR") "be available to provide assistance" is objectionable for several reasons. First, it is vague -- does it mean the employee must be stationed at the work area or available on the premises? Second, is the employee required to administer CPR in an emergency? Finally, this requirement raises some liablity questions for the CPR-trained employee as well as the employer. For example, under Alabama law, an employee administering CPR could be personally liable for his or her unsuccessful efforts.

CPR training requires frequent practice and follow-up to maintain competence. We question whether it is reasonable to expect a continuing level of competence from grain elevator workers, as opposed to medical technicians and trained emergency personnel. Moreover, many small facilities with only one or two employees must rely on the local emergency services available, as not everyone is suited to perform or will perform CPR procedures effectively. Accordingly, NGFA recommends that CPR training and usage be made voluntary.

(h) Contractors

NGFA recognizes the need to inform contractors of the potential fie and explosion hazards and the applicable safety rules of a facility. However, to prevent ambiguity and to prevent the unnecessary extended exchange of information, NGFA recommends that employers only be required to inform contractors of the fire and explosion hazards which relate to his/her work at the facility.

(i) Housekeeping

OSHA's proposed "housekeeping" requirements are ambiguous, unsupported by scientifc evidence, and are not cost-effective. This testimony only concerns the legal, rather than technical deficiencies in the proposed standard, therefore, my remarks on housekeeping will be so limited.

At a minimum, OSHA's three "alternatives" under its housekeeping requirements, sweeping once per shift, the 1/8-inch action level and pneumatic dust control, present a perplexing problem for employers because each is governed by the overriding requirement to "minimize fugitive grain dust accumulations...." Implicit in this requirement is the mandate to eliminate all dust accumulations by any and all means possible. Employers, thus, are given no alternatives.

The language of the preamble to the proposed standard and its appendix indicate that OSHA intends to regulate both airborne and layered dust. The preamble states that a "housekeeping program must specify the methods which will be used to control airborne dust emissions as well as the frequency and methods which will be used to remove dust accumulations." 49 Fed. Reg. 1000. As noted, OSHA also requires a program which "will minimize fugitive grain dust accumulations." To comply with these requirements a housekeeping program would have to include more than the sweeping of floors once per shift, one of the purported "alternatives." In fact, dust collection systems would have to be installed to meet this alternative in the housekeeping provision.

While NGFA supports OSHA's general approach of providing options or alternatives for employers to provide housekeeping, we oppose the housekeeping provision proposed by OSHA in its present form. The housekeeping provision must be amended to provide a wide variety of genuinely performance-oriented options as discussed in Mr. Phillips' testimony.

(1) Preventive Maintenance

OSHA again includes the unnecessary "shall assure" standard in this provision. Employers cannot "assure continued, safe operation" of machinery. Even under the best conditions, preventive maintenance does not guarantee that equipment will operate 100 percent without a failure.

NGFA recommends that the phrase "to assure continued, safe operation" be deleted so that a preventive maintenance program can consist of lubrication and other appropriate preventive maintenance of equipment.

(n) Emergency Escape

Sections 1910.35 - 1910.37 of the general industry standards address emergency egress and its importance when designing, constructing and operating a building or structure. These standards provide a thorough and effective discussion of facility areas that are required to have an exit or exits and how means of escape must be designed, located and maintained. Subsections (b)(3) and (b)(8) of section 1910.36 adequately address the requirements of emergency exits, which OSHA attempts again to address in the proposed grain handling standards.

Contrary to its expressed intent, OSHA is extending the general industry requirements by requiring that specific locations in a grain handling facility must have "at least two means of escape." The grain industry, therefore, no longer has the general industry standard option of providing exits based upon "size, occupancy and arrangement," but would have to provide two exits, regardless of occupancy. This design standard is contrary to OSHA's announced policy of implementing a performance standard.

In addition to specifically requiring "at least two means of escape," OSHA makes a major deviation from the general industry standards by labeling the areas which must have two exits. OSHA proposes that all "tunnels, galleries, scale floors, and work areas normally occupied by employees" must have two exits. No longer could the industry provide exits based upon occupancy, but rather every tunnel in the industry, many of which extend only to the center of a bin and are rarely occupied, would be required to have two exits.

Because emergency egress is already addressed in the general industry standards, because the emergency escape routes are to be addressed by facilities in their emergency action plan, and because OSHA has stated that it does not intend to propose a requirement that is more stringent than existing standards, NGFA recommends that OSHA delete this entire provision from the standard.

Appendixes

Appendix A should be omitted. We disagree with some of the "non-mandatory" advice it contains; it improperly expands the scope of the standard; and it engenders confusion from the standpoint of compliance and enforcement.

Appendix B also should be omitted. These are not "consensus standards" of the grain industry. They were developed by bodies in which members of our indutry, if they participated at all, were in the minority and had no influence on the advisory pronouncements which ANSI/NFPA adopted. Administrative law judges of the Occupational Safety and Health Review Commission have declined to find these pronouncements to be "consensus standards."

Conclusion

In conclusion, OSHA's proposed grain handling standard presents employers with conflicting and overlapping requirements which will not appreciably enhance safety, much less in a cost-effective manner. Compliance problems will abound due to the vague and ambiguous language of the standard. Moreover, some provisions, such as housekeeping, make compliance virtually impossible. OSHA should "go back to the drawing board" and reevaluate how a grain handling standard should be drafted, if at all.

NATIONAL
GRAIN & FEED
ASSOCIATION

Testimony

of

Gary H. Barnett
National Grain and Feed Association

before the

Occupational Safety and Health Administration

Hearing on

Safety Standards for Grain Handling Facilities
Kansas City, Missouri

June 1984

Thank you for the opportunity to testify at this public hearing today. My name is Gary H. Barnett and I am manager of safety and health for Nabisco Brands Incorporated at Parsippany, New Jersey. I am also a member of the National Grain and Feed Association's Safety and Health Committee, on whose behalf I appear today.

There are three specific requirements within the proposed standards which I would like to address in my presentation today: The requirements for bucket elevators, grates and grain dryers.

Bucket Elevators

The provisions for bucket elevators contain numerous requirements addressing static electricity, devices to detect mechanical malfunctions and methods to ease maintenance. OSHA proposes to apply these requirements based upon the location of the bucket elevator: Whether the bucket elevator is inside, outside or partially inside the grain handling facility.

The NGFA believes that the location of the bucket elevator does play a major role in reducing the magnitude of an explosion incident. The NGFA thus supports OSHA's proposal not to regulate bucket elevators that are outside the grain facility. Bucket elevators with only the boot section and the lower segment of the leg casing within the grain facility also provide the safety benefits of outside bucket elevators. OSHA should recognize the safety benefits of the many "partially inside" bucket elevators as defined by OSHA and treat these as outside bucket elevators

The bucket elevator requirements are among the most costly proposed in the standard. Many of the requirements will present both technical and economic burdens upon the grain industry. OSHA and its consultants have greatly understated the economic impact of the bucket elevator provisions upon the grain handling industry. OSHA has underestimated the number of bucket elevators affected and overestimated the benefits of these proposed provisions.

The NGFA estimates that the bucket elevator provisions, as now proposed, would cost the industry over $95 million. This compares to $44 million which Booz-Allen estimates for OSHA. There are nearly 65,000 bucket elevators in the grain industry and 75 percent of these would be currently classified by OSHA as "inside" or "partially inside" bucket elevators.

Many of the requirements for bucket elevators contain technologies that are controversial or unproven. Many operational and maintenance problems have been encountered when these technologies have been used in the past.

All of the proposed requirements will require the installation of new devices and modifications to existing bucket elevators. For a fully automatic facility where few people are available, mechanical and monitoring devices may be useful. However, an employee's experience, education and training often may be more effective than the devices.

Because of the large number of devices that will need to be purchased and installed in bucket elevators, it is necessary that additional time be granted for the industry to meet any retained provisions. For some of the equipment, it is questionable whether adequate suppliers and equipment exist to meet the proposed provisions. Time extensions will be necessary to purchase, and install devices and to make modifications to existing bucket elevators. In no case should the deadline for compliance be less less than one year following the promulgation of the rules.

The requirements for bucket elevators to be grounded and to be equipped with belt alignment devices should be deleted from the proposed standards. A research project, by Safety Consulting Engineers, Inc., for the NGFA's Fire and Explosion Research Council, which has been submitted for the record, has shown that bucket elevators are normally grounded because of the way grain facilities are designed and constructed.

Additionally, there is no evidence to indicate that static electricity has been a problem in bucket elevators. Metal-encased bucket elevators will be grounded by their design and construction, while wood- and concrete-encased bucket elevators cannot be grounded by a simple ground wire from the casing. These non-metallic-encased bucket elevators would require an elaborate grounding system involving ground wires from the various metallic components of the bucket elevator; an unrealistic and unnecessary requirement.

Belt alignment devices are new and untested in the grain handling industry. Reports on the performance of various belt alignment devices utilized in grain elevator operations are not optimistic. Problems have been encountered with their reliabilty, performance and maintenance. An effective preventive maintenance program, will enable early detection of belt misalignment without the need for alignment devices.

OSHA proposes to require that motion detection switches on bucket elevators be interlocked with feeding conveyors such that they will automatically shut down when the belt speed decreases by 20%. The interlocking of equipment for non-automated facilities is not feasible and may in fact produce a serious safety hazard. For example, if the feeding conveyor is automatically shut down while the manually closing bin gate remains open, grain would continue to flow from the bins into the tunnel areas and possibly prevent access to the bin gates. The unmetered grain could present a hazard to employees in the tunnel and may need to be painstakingly removed manually from the tunnel area. It is not feasible for non-automated facilities to interlock all the bin gates with the conveyors and bucket elevators. Even for automated facilities, significant expense can be incurred for interlocking equipment and no demonstrated benefits. OSHA should delete the interlocking requirement.

Inspection doors for both the head and boot sections of bucket elevators are proposed to be required for inside bucket elevators. OSHA's language for this requirement is excessively restrictive since any type of access to the bucket elevator (not only doors) should be permitted. Sliding or "clipped" panels will serve the same purpose as doors and will be the only feasible option at many facilities because of space limitations. OSHA should clarify that any means of access enabling inspection of the head and boot pulleys of bucket elevators will satisfy the requirement for inspection doors.

The proposed OSHA requirement to equip bearings located inside bucket elevators with temperature sensing devices is not necessary since inspection and maintenance could prevent potential bearing problems. Temperature sensing devices are expensive and it would cost the industry over $1,100 per bucket elevator to comply with this provision alone. The option to move bearings external to the leg casing will not be viable for most bucket elevators since this would entail major and costly engineering changes.

OSHA should clarify what is meant by "partially inside bearings" since many bearings are located on and attached to the bucket elevator casing (flange mounted). The National believes that flange mounted bearings attached to the bucket elevator casing should not be considered as "partially inside bearings." Additionally, OSHA should, as a minimum, exempt small facilities from the bearing requirement.

OSHA provides two options to the requirements for motion detectors, belt alignment devices and bearing monitoring devices. The National supports these options as viable alternatives for protecting the bucket elevator. The use of suppression devices has been shown to be effective in preventing flame propagation from the bucket elevators. The NGFA is currently sponsoring a research project that has developed reliable calibrations for devices to measure airborne dust concentrations in bucket elevators and that will further examine the effectiveness of pneumatic dust control for bucket elevators.

Grating

OSHA proposes that grain receiving pits be protected by grates with maximum openings of 2 1/2 inch by 2 1/2 inch or be protected by magnets. Many facilities will not be able to install the 2 1/2 inch-square grates because of the resulting loss in product flow through the grate. Products presenting the most difficulty include eared corn; high moisture corn and soybeans; oats, soybeans or sorghum with large amounts of plant material; and grain products such as meal or feed ingredients.

Grates over receiving pits are utilized by the grain industry for two purposes: 1) to prevent injury to personnel and 2) to aid in removing foreign objects from the grain. A maximum grate opening of 2 1/2 inch in one direction is sufficient to serve the first purpose of protecting personnel. To meet the second purpose, various sizes of grate openings may be selected to remove foreign objects based upon a facility's design and the subsequent grain handling devices, i.e., the bucket elevator. However, very little information is available which suggests the efficiency of various grate openings in removing foreign objects from grain. There is no scientific evidence of the effectiveness of grate openings for removing foreign or ferrous objects from the grain. All past recommendations have been based on conjecture and opinion and are arbitrary. There is no information indicating that the current industry practice of utilizing grates with a 2 1/2 inch opening in one direction is a problem or needs to be addressed.

The National Grain and Feed Association believes that a 2 1/2 inch grate size opening is sufficient for the purposes of protecting employees and removing foreign objects. To gain greater knowledge of the efficiencies of various grate sizes in removing foreign objects, the NGFA's Fire and Explosion Research Council is examining what grate sizes are currently utilized in the industry and is researching various length and width openings for their ability to remove foreign objects commonly found in grain.

In the Fire and Explosion Research Council's project a survey was performed which encompassed an analysis of grating information from 152 grain facilities having 393 receiving grates. It was found that less than 50 percent of receiving pits at grain facilities have either magnets or 2 1/2 inch by 2 1/2 inch grates and that less than eight percent of the facilities' grates would meet a 2 1/2 inch by 2 1/2 inch requirement. However, over eighty percent of the receiving pits are protected by grates that have a maximum of 2 1/2 inch opening in one dimension.

The grating requirement could have a very large impact on facilities because it could necessitate that a facility install additional receiving equipment to maintain its current grain handling rate. OSHA should revise the wording of the grate requirement to ensure that all facilities have the option of utilizing either a magnet or a 2 1/2 inch grate for the receiving areas, not just those which can prove that they have experienced problems with product flow.

OSHA should provide additional time for facilities to be in compliance with a 2 1/2 inch grate requirement. Owners and operators would need to obtain estimates, locate alternative grates, overlays or magnets, and arrange for installation. More than the currently proposed 90-day period will be necessitated for this process. The NGFA recommends that any affected facility have at least one year to meet a grating requirement.

Grain Dryers

OSHA proposes to require that all direct-heat grain dryers be equipped with an automatic device to prevent grain from entering dryer in the event that the exhaust air reaches excessive temperatures or if the grain discharge becomes clogged. This requirement will necessitate that an elaborate system be installed on grain dryers to detect when grain is not being discharged from the dryer.

While most grain dryers are equipped with devices to detect excessive temperatures, very few are equipped with a device to detect a plugged condition of the grain discharge. The estimated cost to install an electronic gate which could be activated for either high temperatures or blockage of the discharge would be in excess of $2,000. This device to detect the plugged condition only serves to duplicate the detection of excessive temperatures. The National Grain and Feed Association recommends that OSHA delete the portion of the requirement which stipulates that grain dryers be equipped with a device that will detect a clogged condition in the grain stream path.

The National Grain and Feed Association supports the grandfathering of existing facilities from the requirement that grain dryers be located outside the facility, as currently proposed by OSHA.

I appreciate the opportunity to appear before you today.

NATIONAL GRAIN AND FEED ASSOCIATION

National Grain and Feed Association
Benefits Assessment
for
OSHA's Proposed Standard for the Grain Handling Industry

The benefits assessment completed by Booz, Allen and Hamilton, Inc.[1] for the Occupational Safety and Health Administration is reviewed in this report. Because of errors in reasoning, misapplication of data and erroneous expansion and extrapolation of the available data that were selected for use, Booz-Allen greatly overstates baseline risk for the grain handling industry, in terms of economic loss, injuries and human lives. Following from this exaggeration of total risks, Booz-Allen also assumes overly optimistic effectiveness of the standard and overstates benefits that could arise from adopting the proposed safety standards for the grain handling industry.

A. Baseline Risk of Fires

The Booz-Allen analysis estimates that within the grain handling industry, there are a total of 2,661 fires occurring annually, including 50 major fires and 2,611 minor fires. These fires are estimated to cause an annual [illegible] deaths, 1,360 temporary disability injuries and 0.8 permanent disabilities. A summary of Booz-Allen calculations of baseline society loss due to fires is contained in Exhibit [illegible], p. [illegible] of the report, a copy of which is presented on the next page. As noted in the table, the annual baseline economic loss to society is estimated at $[illegible] million in 1982 dollars.

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[1] Booz, Allen and Hamilton, Inc., Some Impacts of a Proposed OSHA Standard on Grain Handling Facilities, April 198[illegible].

The number of fires. Concerning the number of annual fires in the grain industry, the data used by Booz-Allen is the same as that employed by A.D. Little[2] in its earlier analysis -- annual data compiled by the National Fire Protection Association (NFPA). Unfortunately these NFPA data are only available for the years, 1958 through 1975.

Booz-Allen took a simple average of all the fires from 1958 through 1975 to estimate total fires at 2,661 annually. Using these same data, A.D. Little estimated total fires at 2,200 annually, a figure which is closer to the most recent levels of reported fires in 1974 and 1975. The problem with both of these estimates is that they are based upon old data. The implicit assumption is that the industry has made no improvement in its working practices and safety procedures to help prevent fires and other hazards that threaten worker safety. While no data may exist on industry fires since 1975, there are data that indicate that general safety conditions within the industry have improved substantially since 1975. Bureau of Labor Statistics injury incidence rates reported for the 1975 to 1982 period indicate that the trend in total injury rates has declined at an annual rate of 2.5 percent, or a total of 17.5 percent across the seven year period for the grain mill product industry (SIC 204). Data for the farm product raw material industry (SIC 515), which includes grain elevators, indicate injuries declined at an annual rate of 4.1 percent, or a total of 28.5 percent for the seven-year period.

It could be argued that, on the basis of general declining injury rates in the industry, any estimate based upon data this old or outdated probably overstates fire risk. In fact, if the rate of fire occurrence declined at the same rate since 1975 as general workplace injuries within the industry, a more realistic number might be 1,600 to 1,800 annual fires. In addition, safety experts within our industry have raised questions on the accuracy and applicability of this data to our industry. Nevertheless in our analysis, we use the figure of 2,200, the same as A.D. Little estimated. In doing so, it should be recognized that this figure very likely contains upward bias.

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[2] A.D. Little, Technical Feasibility and Economic Impact Analysis (EIA) for Various Standards Provisions Applicable to Hazards in Grain Handling Facilities, February 1, 1983.

Major Fires. A.D. Little estimated the number of major fires at 55 per year. In actual data reported by the NFPA for 1976 through 1981, there was an average of only 11 reported major fires per year. But A.D. Little decided this figure undercounted major fires by a factor of five, because USDA data on explosions indicated 5 times the number of explosions that were reported by NFPA. The Office of Management and Budget on April 11, 1984[3] issued a critical analysis of this approach which correctly identifies the fallacies in the A.D. Little assessment. The OMB analysis states, "Although the NFPA data on explosions record only 20 percent of the explosions that the USDA data includes, it contains 97 percent of the fatalities and 49 percent of the injuries from explosions." The point OMB is making is that the manner in which NFPA data are collected -- from newspaper accounts -- which are highly likely to contain stories on any fires or explosions of major consequence -- makes it inappropriate to expand the data by the measured degree of underreporting for all fires and explosions. We concur with OMB that a more valid approach would be to expand the data on reported major fires, if at all, by the known factor of NFPA underreporting of injuries or fatalities caused by explosions.

Booz-Allen makes an attempt to add further support to the A.D. Little analysis by quoting extensively from a study on the incidence of major fires in Canadian elevator facilities.[4] This report estimated that the average risk of major fire for each facility in Canada ranged from .001207 to .004541 for the years 1970 to 1979. Booz-Allen then applied this estimated risk to the estimated 16,164 grain handling facilities in the U.S., leading to an estimated major U.S. fires of 19.5 to 73.4 per year, with a midpoint of 46.5.

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[3] Office of Management and Budget, "OSHA's Proposed Standards for Grain Handling Facilities," April 1984.

[4] Western Primary Elevator Fire and Explosion Task Force, Report #2, Western

Booz-Allen assumed, incorrectly, that the fire risk in the U.S. is comparable to Canada. This assumption leads to a gross exaggeration of estimated major fires in the U.S., because of the notable difference in materials used in construction. In contrast to U.S. grain facility construction, Canadian elevators use wood extensively. While no percentages of Canadian construction materials are available, wood is widely recognized as the dominant type of construction.[5,6] U.S. elevators are constructed largely of steel and concrete. Our survey of 812 facilities indicated that wood construction is 18.5 percent of facility construction in the U.S. as indicated in the table below.

NGFA Estimate of Percentage Wood Construction

Industry Segment	No. of Facilities	Percent of Construction Consisting of Steel and Concrete	Percent of* Construction Consisting of Wood or Other Materials
Country Elevators	10,415	79.6%	20.4%
Inland Elevators	460	86.7%	13.3%
High Throughput	250	91.5%	8.5%
Export Terminals	75	93.7%	6.3%
Small Feed Mills	3,030	80.0%	20.0%
Large Feed Mills	1,040	88.4%	11.6%
Processors	894	94.3%	5.7%
Total	16,164	81.5%	18.5%

* These percentages are based on type of facility construction reported in survey of 812 grain handling facilities. Respondents were asked how much total storage capacity their facility contained and also how much steel tank storage and concrete storage they had. The percent of construction consisting of wood or other materials represents the residual quantity of storage other than concrete or steel. It is an overstatement of the percent of wooden construction because it also includes rectangular buildings constructed by steel poles, concrete floor and tin coverings as well as other types of construction.

The implication of this comparison in construction characteristics is that concrete and steel facilities in the U.S. face a much lower fire risk of serious fires causing damage to the facility than do the wooden facilities in Canada. Therefore, the Canadian fire incident rate cannot be applied to U.S. facilities

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[5] Grain and Oilseeds, Handling, Marketing and Processing, First Edition, Canadian International Grains Institute, March, 1973.

[6] "A Preview of a New Concept in Elevator Design," A paper presented at Elevator Design Conference, Sept. 27-28, 1979, Kansas City, Mo.

to measure fire risk. Obviously, it would overstate U.S. fire risk by quite a large factor.

OMB suggests that the incidence of major reported fires might be more appropriately expanded by using the degree to which death or injury rates are underreported in NFPA explosion data (as noted earlier, NFPA explosion data contained 97 percent of facilities and 49 percent of injuries by explosions.) This expansion results in an estimate of annual major fires of 12 to 23, rather than the 50 assumed by Booz-Allen.

Fatalities and Injuries from fires. Booz-Allen used NFPA fire incident data reported for 1976-1981 to estimate the distribution of casualties that could be expected from major fires and other fires. This distribution reported on page II-16 of the Booz-Allen report is presented below:

Weight of Casualities
by Type of Event

	Temporary Disability	Permanent Disability	Deaths
Major Fires	.89	.02	.09
Other Fires	1.00	0.00	0.00

Using the data and applying the exaggerated estimates of the number of total fires and major fires that were based on erroneous assumptions, Booz-Allen also exaggerates the baseline risk of injuries.

Taking NFPA's estimate of the average number of casualties per major fire at 0.80, Booz-Allen assumes 50 major fires result in 35.6 (50 x 0.80 x .89) temporary disabilities, 0.8 (50 x 0.80 x .02) permanent disabilities and 3.6 (50 x 0.80 x .09) deaths. Using a more realistic estimate of major fires that can be justified with available data -- between 12 and 23 per year -- major fires result in an expected annual casualty rate of 8.5 to 16.4 (12 to 23 x 0.80 x .89) temporary disabilities, 0.2 to 0.4 (12 to 23 x 0.80 x .02) permanent disabilities, and 0.9 to 1.7 (12 to 23 x 0.80 x .09) deaths.

Concerning injuries from fires other than major fires, both Booz-Allen and A. D. Little make an arbitrary assumption without any statistical basis that there are one-half as many casualties per event in minor fires as there are associated with major fires. This assumption leads to an estimate of 0.4 casualties per "non-major" fire. While admittedly there is little information available on the casualty rate for non-major fires, the data that are available permit statistical estimation of casualty rates.

Presumably, the severity of a fire, and the corresponding economic loss, should be related to the probability of injury. Logically, the greater and more severe the economic loss, the greater the chance for workers or firefighters to be injured. In Appendix H of the A. D. Little assessment, data on all types of fires in grain handling facilities, both major and minor, are reported for the years 1971 to 1982. In 125 of these reported events, both economic losses and casualty rates are reported. Hypothesizing some relation between economic loss (in thousands of dollars) and rate of injury per fire, these data were used to estimate this relationship with linear regression analysis. The estimated equation is presented below:

$$\text{Injury Rate Per Fire} = .234 + .000875\ (\text{Economic Loss in } \$1{,}000)$$

As hypothesized, the injury rate per fire and the economic loss are positively correlated. The simple correlation coefficient between the two data series is +.33. The estimated equation is quite useful, because it provides a logical, scientific approach to estimate the expected injury rate per fire if the assumed economic loss is known. For example, Booz-Allen estimates the average property damage per major fire at $673,000. The data from 125 reported fires indicate that for a fire of this magnitude, an injury rate of 0.82 per fire should be expected. This estimate is remarkably close to the 0.8 used by Booz-Allen for major fires. However, for a fire causing a $12,485 loss, as estimated by Booz-Allen, the equation estimates an expected rate of 0.24 injuries per fire considerably lower than the 0.4 which was assumed by Booz-Allen.

Using the estimate of 2,200 total annual fires and subtracting the estimate of major fires, between 12 and 23, total expected "non-major" fires per year are estimated to be between 2,177 and 2,188. Using an estimated injury incidence per fire of 0.24, "non-major" fires are estimated to cause between 522 and 525 temporary disabilities, compared to 1,044 estimated by Booz-Allen.

The cost of injuries and deaths. While difficult at best to place any value on human injury or human life, nonetheless, these valuations have a critical impact on the overall estimate of baseline risk and benefits of the proposed standard. The Booz-Allen analysis values a human life at $3.5 million, a permanent disability at $682,300 and a temporary disability at $34,100. For each of these estimates, Booz-Allen quotes Viscusi[7] as a source.

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[7] Viscusi, W. K., *Employment Hazards, An Investigation of Market Performance*, Cambridge, Mass., Harvard University Press, 1979.

It should also be noted that Viscusi[8] in a book published in 1983, placed a somewhat lower value on the costs associated with life and injury. On page 106 of Viscusi's most recent work, he states, "The value of preventing non-fatal job injuries is about $20,000 to $30,000, while the value of life ranges from about $500,000 for workers in high risk jobs to $3 million or more for more representative workers. For the purposes of policy evaluation, the Thaler and Rosen estimates of $500,000 seem most reasonable for workers in high risk jobs (about 1/1,000 annually). For workers facing less severe risks (about 1/10,000 annually), an estimate of $2 million appears more reasonable."

It is interesting to note that Booz-Allen's assessment of the grain handling industry indicates a death risk of 63.6 workers per the 197,980 total workers or approximately one death per 3,000 workers. Although we will demonstrate why this estimate substantially overstates actual risks, Viscusi's statement would suggest an appropriate range in values for Booz-Allen estimated risk of between $500,000 and $2 million, considerably lower than the Booz-Allen assumed value of $3.5 million. Thus, while Booz-Allen uses the estimates from Viscusi, they apparently chose to ignore Viscusi's own interpretation of the estimates and his recommendations for proper application in policy analysis.

It should be noted that there are a number of other economic studies that place a considerably lower valuation on life than Viscusi. In the A.D. Little report, p. V-20, numerous other sources were referenced that contained estimates of the value of life at lower levels. A.D. Little decided to use an estimate of the value of life of $808,600, the same estimate that is commonly used by the Consumer Product Safety Commission.

Our intent in this analysis is to estimate the range in the potential overstatement of baseline risk in the Booz-Allen analysis based upon reasonable assumptions that can be justified. To do this, this analysis utilizes a value of human life at $1 million, somewhat higher than A.D. Little's assessment and within the range of $500,000 to $2 million recommended by Viscusi. This analysis also uses the figure of $3.5 million assumed by Booz-Allen as an absolute maximum.

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[8] Viscusi, W.K., Employment Hazards, An Investingation of Market Performance, Cambride, Mass., Harvard University Press, 1979.

Concerning the valuation of non-fatal injuries, Booz-Allen's estimate of $34,100 was apparently based upon the high side of Viscusi's estimated range of $20,000 to $30,000 (expressed in 1980 dollars). (Adjusting the $30,000 for inflation into 1982 dollars, using the GNP deflator, a figure between $34,000 and $35,000 is obtained.) If you adjust the lower side of Viscusi's range, $20,000, to 1982 dollars, a figure of about $23,000 is derived. This analysis assumes a range of $25,000 to $34,100. In view of Viscusi's analysis, the estimate of $25,000 is a very conservative estimate (i.e., high) of the lower side of the potential range in reasonable estimates.

Business interruption expenses. Booz-Allen and A.D. Little both include an estimate of business interruption losses as part of the baseline risk assessment for fires and explosions in the industry. As stated in the A.D. Little report (V-24), business interruption loss includes "loss of profits and those fixed charges that continue regardless of whether or not the business is operating." A.D. Little proceeds to estimate average business interruption losses from a sample of 44 events. Booz-Allen uses the data on business interruption costs that were generated from the A.D. Little report.

The issue of business interruption losses from explosions, fires or any other event that forces temporary cessation of business activities is a real cost to the individual firm. But there is serious question as to whether it is applicable to the entire industry or should be included as part of the costs to society of business interruption. This is particularly true of a highly competitive industry that has overcapacity, particularly in this era of extensive on-farm storage. Chapter II of A.D. Little provides a fairly accurate description of the economic conditions in the grain industry. As A.D. Little indicates, storage markets are highly competitive because of the large amount of on-farm capacity (which now even exceeds total commercial storage capacity). Also, the industry is now operating at probably 60-70 percent of its current handling capacity for grain. Given this situation, any temporary loss in capacity created by a fire or explosion has no meaning for interruption in service by the industry in general. If storage capacity is lost, farmers store grain for longer periods on the farm or store at other nearby facilities. If substitute grain handling capacity is needed, nearby competitors are always ready to step in and fill the void left by an elevator out of service. Certainly, business interruption losses consisting of the continuation in fixed costs and the lost profits are incurred by the damaged facility. But the profits lost by one firm are readily absorbed by other firms nearby that have excess capacity. And the fixed operating costs of the firm that experiences a fire or explosion are not made any higher by the occurrence of the event. The fixed costs to the entire industry are unchanged by any event interrupting a single facility's service.

The conclusion is that while business interruption expenses are real at the micro-firm level, for an entire industry that is both highly competitive and has excess capacity, the actual losses industry-wide are extremely low. In this analysis, we assume the business interruption losses at zero.

Summary of baseline risk for fires -- summary. The table on the following page summarizes the estimated baseline risk for fires within the grain industry. Total annual risks associated with fires are estimated to be within a range of $49.6 million to $67.5 million, depending upon the assumed values for life and injury and the estimated possible ranges for major and minor fires. This range of baseline fire risk is substantially lower than that estimated by Booz-Allen at $148.2 million.

NGFA Revised

Calculation of Annual Baseline Losses

Due to Fires

(1982 Dollars)

Type of Losses Due to Fires in Grain Handling Facilities	No. of Incidents Per Year	Estimated Willingness to Pay Per Incident	Baseline Loses To Society $
Deaths			
Major Fires	0.9 - 1.7	$1.0 mil. - $3.5 mil.	$900,000 - 5,950,000
Minor Fires	0	$1.0 mil. - $3.5 mil.	0
Temporary Disabilities			
Major Fires	8.5 - 16.4	$25,000 - $34,100	$212,500 - 559,240
* Minor Fires	522 - 525	$25,000 - $34,100	$13,050,000 - 17,902,500
Permanent Disabilities			
Major Fires	0.2 - 0.4	$682,300	$136,460 - 272,920
Minor Fires	0	$682,300	0
Property Damage			
Major Fires	12 - 23	$673,090	$8,077,080 - 15,481,070
Minor Fires	2177 - 2188	$ 12,485	$27,179,845 - 27,317,180
Business Interruption			
Major Fires	12 - 23	0	0
Minor Fires	2177 - 2188	0	0
TOTAL			$49,555,885 - 67,482,910

B. Baseline Risk of Explosions

The Booz-Allen analysis of the baseline risks for explosions is estimated on the basis of the following data reported on pp. II-22 and II-23 of its report for OSHA.

Grain Industry Explosion Incidence Data

	No. of Explosions in the U.S.	No. of Deaths	No. of Injuries
1970	10	1	14
1971	10	4	14
1972	8	7	23
1973	8	2	10
1974	15	13	37
1975	9	4	19
1976	22	22	83
1977	31	65	87
1978	20	8	46
1979	29	2	18
1980	45	10	50
1981	21	13	62
1982	14	11	32
1983	12	0	14

To estimate the industry's baseline risk for explosions in future years -- 1984 through 1993, both A.D. Little and Booz-Allen used a simple average of explosion, death and injury rates beginning with the year 1976 to the present. In neither study was the selection of this data period explained or justified as having any scientific merit. And, in the case of grain industry explosion data, the use of 1976 and 1977 data to produce estimates of future explosion rates results in tremendous distortions in the results and considerable upward bias in the estimated risk.

In assessing baseline risk from fires, explosions or any other hazard, the purpose is to estimate risk on the basis of current and future risks associated with current design, construction and operating characteristics in the industry. If historical data on hazards has been fairly constant, or varying about a relatively constant mean value, an historical average might be appropriate to use if there have been no structural changes of significance within the industry. Neither is true of the grain industry. Following the major explosions of 1976 and 1977, many facilities, especially export and other high throughput terminals, were retrofitted with equipment to make them safer. In addition, the industry became much more safety conscious as industry associations launched educational programs on safety and initiated a research program aimed at improving safety in facilities. The explosion incidence and severity data reflect these changes.

The approach taken by Booz-Allen to estimate current and future explosion risks on the basis of 1976-1983 data results in an estimated annual baseline risk of 24.3 explosions, 16.6 deaths, and 48.9 injuries. By including 1976 and 1977 in the data to estimate future risks, Booz-Allen mistakenly assumes that the industry has not improved safety since 1976 and 1977. Also, by taking a simple average, the implicit assumption is that the explosion data recorded in 1976 and 1977 is just as important in determining current and future risks as is the data for 1982 and 1983. If a researcher feels it is necessary to include data across a long historical period, it would be more appropriate to give the more recent data a heavier weighting than older data since the more recent data is obviously more reflective of current industry conditions.

As noted by [illegible] in its review of the A.D. Little study, the bias in the baseline risk estimates is clearly recognizable by simply comparing the estimated baseline risk to the data for the last six years. While Booz-Allen estimates current death risk from explosions at 16.6 annually, the maximum number of deaths for any one year since 1970 has been 13 which occurred in 1981. And the average number of deaths for 1970 to 1985 was 7.3, only 67 percent of the baseline risk estimated by Booz-Allen.

To estimate future risk of explosions and the associated fatalities and injuries, there are two approaches that could be taken. It estimate future risk on the basis of historical averages, for a period that can be reasonably assumed to reflect operating conditions similar to those in the future[1] period; or, if there is a realistic trend in the data which is believed to be indicative of changing structural and operating characteristics, trend analysis can be used. OSHA in its review of the U.S. [illegible] history, "It seems reasonable to infer that the sharp decline in explosion fatalities since 1976 and 1977 -- from an average of 46 deaths per year to an average of seven per year over the following six years -- reflects changes in the safety environment of the industry, resulting from employers' and employees' increased awareness of explosion risks and their potential impact, and effective measures to control them.[2]

Using the more appropriate observation period of 1978 to 1985, the annual baseline explosion risk could be estimated to average at [illegible] explosions, [illegible] deaths and [illegible] injuries. Trend analysis is particularly effective in predicting future risks if changes in structural or operating characteristics are continually being made as is likely the case for the grain industry. Trend analysis is superior to simple averages in that it takes into account [illegible] the reasons for the trend will continue, the estimated future risks are more closely related to data from recent years. Linear trends were estimated using the 1970 to 1985 data on the incidence of explosions, deaths and injuries. This analysis resulted in the following equations:

Expected number of Explosions = [illegible]

Expected number of Deaths = [illegible]

Expected number of Injuries = [illegible]

Where t = 1 in 1970, 2 in 1971, ...and 16 in 1985.

The trend analysis for this period is particularly convincing since all three areas of risk -- explosions, deaths and injuries -- are indicated to have declining trends. Using these estimated trends to predict future risks, baseline risks in 1984 are estimated to be 12.6 explosions 6.3 deaths and 26.4 injuries.

Using both the simple averaging approach and estimated trends, a reasonable range of expected baseline risks can be developed. These ranges are indicated in the table below.

NCFA Estimated Range in Annual
Baseline Explosion Risks

No. of Explosions	No. of Deaths	No. of Injuries
12.6 to 23.5	6.3 to 7.3	26.4 to 37.0

The table on the next page presents Booz-Allen's estimated calculations for baseline losses due to explosions and a revised table which adjusts the data in accordance with the more realistic assessment of current and future explosion risks. Adjustments also are made in the Booz-Allen estimates for the value of injuries and life and business interruption costs, which again are not valid to be included as a societal cost.

Booz-Allen Annual Baseline

Losses Due to Explosions

(from Table II-8 in Booz-Allen Report)

Type of Losses Due to Explosions	No. of Incidents Per Year	Estimated Willingness to Pay per Incident	Baseline Loss to Society
Deaths	16.4	$3,500,000	$ 57,400,000
Temporary Disabilities	32.4	$ 34,100	$ 1,104,840
Permenent Disabilities	16.5	$ 682,300	$ 11,257,950
Property Damage	24.3	$1,879,185	$ 45,664,196
Business Interruption	24.3	$1,087,570	$ 26,427,951
TOTAL			$141,854,937

NGFA Revised Estimates of Annual Baseline

Losses Due to Explosions

Type of Losses Due to Explosions	No. of Incidents Per Year	Estimated Willingness to Pay per Incident	Baseline Loss to Society
Deaths	6.3 - 7.3	$1.0 mil. - $3.5 mil.	$6,300,000-25,550,000
Temporary Disabilities	17.5 - 24.5	$25,000 - 34,100	$ 437,500- 835,450
Permanent Disabilities	8.9 - 12.5	$682,300	$ 6,072,470- 8,528,750
Property Damage	12.6 - 23.5	$1,879,185	$23,677,731-44,160,848
Business Interruption	12.6 - 23.5	0	0
			$36,487,701-79,075,048

C. Baseline Risks from Causes Other than Fires and Explosions

Booz-Allen uses an approach similar to that employed by A.D. Little to estimate baseline risks from hazards other than fire and explosions. Using an OSHA survey[9] on industry deaths and causes during 1976 to 1981 they "expand" the data to account for underreporting of incidents. In the OSHA data, there are a reported 37 deaths from fires and explosions, or an estimated 6.2 per year over the five year period. Booz-Allen erroneously concludes that this indicates the OSHA data is underreporting total deaths by a factor of 3.2 because there is an estimated 3.6 deaths from fires and 16.4 deaths annually in the more complete data set available (the factor of 3.2 was derived by calculating; (13.6 + 16.4)/6.2 = 3.2). OMB's analysis points out the fallacies of this extrapolation. On page 20 of OMB's report, it is stated, "there are three reasons why this procedure produces an upwardly biased estimate. First, excluded from the investigations of fatalities but occurring in the sample were 54 deaths from two explosions. They were excluded because of remaining unresolved legal problems. Second, as pointed out above, the RIA's (A.D. Little) estimate of deaths from fires is overstated because of faulty extrapolation (the number of major fires was overstated)...third, the twenty-six federal OSHA states plus Iowa that make up the sample contain about 75 percent of the grain handling facilities in the U.S. If risks are proportional to the number of facilities by state, the extrapolation factor should be 1.3 rather than the 2.6 used."

Making the adjustments in the data analysis suggested by OMB, the total number of death incidents involving fires and explosions investigated by OSHA was 37 + 54 = 91, or an average of 15.2 deaths per year. Total deaths from explosions during the 1976 to 1981 period were 120, or an average of 20 annually. Using the midpoint of our estimated range in the number of annual deaths due to major fires (range of 0.9 to 1.7), 1.3 deaths from fires added to 20 deaths from explosions results in a total of 21.3 annual deaths from fires and explosions. The estimate of undercounting in the OSHA data then is more correctly estimated at 21.3/15.2 = 1.4, which is impressively close to the 1.3 factor mentioned by OMB which relates to the states and percentage of grain facilities covered by the OSHA survey. Using 1.3 to 1.4 as a range of estimates for the degree of underreporting in the OSHA data, it is estimated that the annual number of deaths from causes other than fires and explosions is 19.5 to 21.0. This is derived by taking OSHA's total estimate of 1976-81 deaths of 127, subtracting the 37 deaths due to fire and explosion and multiplying by calculated factors of 1.3 and 1.4. (127 - 37 = 90; (90 x 1.3)/6 = 19.5; (90 x 1.4)/6 = 21.0)

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[9] Selected Occupational Fatalities Related to Grain Handling as Found in Reports of OSHA Fatality/Catastrophe Investigations, Office of Statistical Analysis, Occupational Safety and Health Administration, January 1983.

Other Injuries. The Booz-Allen analysis reports only limited Bureau of Labor Statistics (BLS) data on injury rates, which seems to indicate a poor record of safety for the grain handling industry. On the next page, a more complete record of the BLS data for the grain industry and other major industry segments is presented. Unfortunately, the BLS data are not broken down to give specifics on the injury frequency for specific industry segments in every case. In reading the table attention should be focused on the industry SIC codes relating most closely to grain industry, SIC 204 (grain mill products), SIC 2048 (prepared feeds), and SIC 515 (farm product new materials) which includes grain elevators.

BLS data on worker injuries are based upon the most complete sample from the industrial sector of any continuous series of data. For this reason they should be given great weight in assessing the degree and severity of workplace risks for various industry sectors. The BLS data in the table are not given for any years earlier than 1975, because prior to 1975, the data were not reported for many sectors with 3 and 4 digit sic codes. In any event, the 1975-1982 data that are given provide an eight-year history of experience in grain industry injury rates.

The top half of the table reports the total number of recorded injuries per 100 full time equivalent workers, while the botton half of the table reports the total number of recorded lost workday cases. That is, injuries included in the top half of the table often were so minor that no workdays were missed.

In analyzing injury data for various industrial sectors, there are two meaningful ways to compare the data: 1) the absolute level of measured risk; and 2) the change in risk relating to improvement on decline in safety. Considering first the absolute level of risk, the table presents an average of the three most recent years' (1980-1982) injury ratios. The entire private sector, which includes a high percentage of service industries as well as manufacturing, mining and agriculture has a fairly low incident rate over the last three years, as might be expected. Broad industry categories of agriculture, mining, construction and manufacturing are probably more comparable to the grain handling and processing industry because of the greater similarity in working conditions. In the last three years, these industry categories have had total injury case ratio ranging from 11.1 to 15.1 per 100 FTE workers and lost workday injury cases ranging from 5.0 to 6.3 per 100 FTE workers. The grain mill products (SIC 204) and prepared feeds (SIC 2048) categories compare very closely to these general patterns for other industries. Interestingly, grain mill products and prepared feed compare very favorably to other similar industries within the two-digit SIC code 20, which seemingly contains industries that should be the most comparable. Injury rates for grain mill products and prepared feeds are 20-28 percent lower than for the total SIC 20 industry category. Grain elevators are included as part of SIC 515, farm product raw materials. In terms of absolute levels of injury risk, this category is extremely low. Regarding total

Bureau of Labor Statistics Data
for Selected Industrial
SIC Codes

	Total Injury Cases Per 100 Full Time Equivalent Workers									Annual Percentage Change, Based on Trend,
	1975	1976	1977	1978	1979	1980	1981	1982	1980-82 Average	1975-1982
Private Sector	9.1	9.2	9.3	9.4	9.5	8.7	8.3	7.7	8.2	-2.0%
Agriculture-Forestry-Fishing	10.5	11.0	11.5	11.6	11.7	11.9	12.3	11.8	12.0	+1.9%
Mining	11.0	11.0	10.9	11.5	11.4	11.2	11.6	10.5	11.1	+0.0%
Construction	15.9	15.3	15.5	16.0	16.2	15.7	15.1	14.6	15.1	-0.7%
Manufacturing	13.0	13.2	13.1	13.2	13.3	12.2	11.5	10.2	11.3	-2.6%
Food Products (SIC-20)	18.3	19.3	19.5	19.4	19.9	18.7	17.8	16.7	17.7	-1.2%
Grain Mill Products (SIC-204)	15.7	15.4	14.9	15.0	15.6	14.7	12.7	12.7	13.4	-2.5%
Prepared Feeds (SIC-2048)	15.6	15.4	14.2	15.3	15.7	15.0	12.3	13.9	13.7	-1.8%
Wholesale Trade (SIC-51) Non durable goods	8.5	8.2	9.0	9.3	9.1	8.7	8.2	7.7	8.2	-0.9%
Farm Products (SIC-515) Raw materials	9.0	9.7	n.a.	n.a.	n.a	8.6	6.4	6.6	7.2	-4.1%

	Lost Workday Injury Cases Per 100 Full Time Equivalent Workers									Annual Change, Based on Trend,
	1975	1976	1977	1978	1979	1980	1981	1982	1980-82 Average	1975-1982
Private Sector	3.3	3.5	3.6	4.1	4.3	4.0	3.8	3.5	3.8	+1.2%
Agriculture-Forestry-Fishing	4.4	4.7	5.1	5.4	5.7	5.8	5.9	5.9	5.9	+5.2%
Mining	5.6	5.8	6.0	6.4	6.8	6.5	6.2	5.4	6.0	+0.5%
Construction	5.5	5.5	5.9	6.4	6.8	6.5	6.3	6.0	6.3	+2.1%
Manufacturing	4.5	4.8	5.1	5.6	5.9	5.4	5.1	4.4	5.0	-0.5%
Food Products (SIC-20)	7.3	8.0	8.5	8.9	9.5	9.0	8.6	8.0	8.5	+1.5%
Grain Mill Products (SIC-204)	6.0	6.6	6.5	6.9	7.7	7.2	6.1	5.7	6.3	-0.3%
Prepared Feeds (SIC-2048)	6.1	6.9	5.9	6.9	7.5	7.0	5.5	5.9	6.1	-0.8%
Wholesale Trade (SIC-51) Non durable goods	3.6	3.8	4.1	4.4	4.5	4.5	4.1	4.0	4.2	+1.7%
Farm Products (SIC-515) Raw materials	3.4	4.7	n.a.	n.a.	n.a.	[illegible]	[illegible]	[illegible]	3.4	[illegible]

injuries, 7.2 per 100 FTE workers recorded for SIC 515 is 35-50 percent lower than major industrial categories of agriculture, mining, construction and manufacturing. Moreover, SIC 515 total injury rates are 12 percent lower than the entire private sector which includes a number of very low risk service industries such as retailing, finance and real estate.

Even more intriguing than the absolute levels of risk are the implied improvements or decreases in safety by conditions. An estimate of the annual percentage change in injury rates across the eight year period (based upon linear trend regression analysis), is given in the far right-hand columns of the table. Regarding the average annual percentage change in total injuries, most of the industry categories have declined although agriculture and mining did increase. (OSHA has, in fact, used these data to justify the success of its efforts in recent years.) Grain mill products average injury rate declined at a 2.5% annual rate, prepared feeds declined at a 1.8% rate and farm product raw materials declined at a 4.1% annual rate. Comparing these rates to other industry categories presents an impressive record of improved safety for these grain industry categories.

Reviewing the trends in lost workday cases (lower half of the table), the only industry segments of all those shown that demonstrated reduced frequency of lost workday injuries were the grain mill products (SIC 204), prepared feeds (SIC 2048), and farm product raw materials (SIC 515).

The conclusions from this analysis should be obvious. Taking the grain industry as a whole, the absolute levels of injury rates are significantly lower than many comparable industries. In addition, the grain handling and processing industry has demonstrated a steady decline in all categories of injuries in recent years. Across the seven year period, total injuries have declined by 17.5 percent in farm product raw materials. These data present records of safety improvement that are matched by few other industry sectors.

As such, these data add further credence to the argument that the decline in the number of elevator explosions is related to changes in structure and operating characteristics of the industry.

In Booz-Allen's assessment of injury risks, an average of 1980 and 1981 lost workday injury rates is used to estimate the risk for grain mill products. Curiously, Booz-Allen did not include 1982 data in this estimate, (1982 data are reported by Booz-Allen in Exhibit II-10 p. II-31 for all categories other than grain mill products). Booz-Allen's estimated injury rate from these years was 6.7 injuries per 100 FTE workers. Booz-Allen then adjusted this figure by a 1974-76 ratio of grain elevator to grain mill product injury rates (a factor of .89). Multiplying these rates times the estimated number of industry employees, Booz-Allen estimated total annual lost workday cases for the industry at 12,717.

These are at least four reasons why this figure exaggerates the baseline risk of other injuries:

1. Booz-Allen "failed to include" the 1982 BLS estimate of injury rates in the grain mill products in estimating current and future risks. The 1982 estimate of 5.7 per 100 FTE workers is significantly lower than 1980 and 1981. Including this in the estimate reduces the average injury rate from 6.7 to 6.3.
2. Booz-Allen used an estimate of the ratio of injuries in grain elevators to grain mill products that was based on old data. Based upon the trend analysis comparison between SIC Codes 204 (grain mill products), and 515 (farm product raw materials), it is highly likely that this relationship has changed substantially. If we assume that the decline in injury frequency since 1975 for grain elevators is similar to that for the entire SIC 515 category, we can estimate a more current value for the ratio of grain mill product-to-grain elevator injury rates. The trends in the previous table indicate that from

1975 to 1982 injury rates in SIC-515 have declined by 21 percent (7 years x -3.0%) while injury rates in SIC-204 have fallen by 2.1 percent (7 years x -0.3%). Adjusting the .89 factor used by Booz-Allen by these trends, .89(1 - .21)/1.0 (1 - .021) = .72. This adjustment makes the estimated ratio in injury rates more reflective of current industry injury rates.

3. Booz-Allen uses A. D. Little's estimates of the total workforce in the industry, which, based upon our survey of 812 facilities, overstates the total number of full time equivalent workers. Presented below is a comparision of the number of workers assumed by Booz-Allen and an estimate of FTE workers based upon our survey. Booz-Allen multiplied the assumed injury frequency rate by 197,980. As this figure for employment was based on the 1977 Census of Manufactures, it is not surprising that more current data reflect a noticeable change.

Comparison of Booz-Allen
Estimates of Full-Time Equivalent Workers
Compared to Estimates from NGFA Survey

Type of Facility	No. of Facilities	No. of employees in segment estimated by Booz-Allen	No. of full-time* equivalent employees in segment estimated by NGFA Survey
Grain Elevators	11,200	78,200	70,079
Feed Mills	4,070	49,470	41,963
Flour Mills	368	14,110	14,190
Wet Corn, Cottonseed Soybean Mills	216	21,860	13,066
Other	310	34,340	29,232*
Total	16,164	197,980	168,530

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*Our survey did not estimate employment for this sector. This computed figure was based on the assumption that the average upward bias for other categories of the industry was the same as this "other" sector. The figure is approximately 85% of the value assumed by Booz-Allen.

4. Because the data on injury rates for the grain industry show a declining trend, Booz-Allen's use of historical averages potentially biases the estimates for future years, especially those years toward the end of the ten-year analysis period. Assuming that current trends continue, the use of current average could lead to substantial upward bias in baseline risk assessment over 10 years.

Making these adjustments in the Booz-Allen analysis, total lost workday cases in the industry are estimated below.

NGFA Estimated Annual Injury Rates for Grain Handling Facilities

	Injury Rate		Employment		
Grain Mill Products	6.3/100 FTE Workers	X	98,451	=	6,202
Grain Elevators	4.5/100 FTE Workers	X	70,079	=	3,154
				Total	9,356

It should be emphasized that this estimate of 9,356 total lost workday injuries still may contain some upward bias, because it assumes no further improvements in safety will occur in the absence of safety standards from 1984 through 1993. Recent trends indicate further improvement is likely. By substracting the calculated injuries and deaths from fires and explosions and deaths from other causes, the total number of lost workday injuries from other causes is estimated at 8,748 to 8,772 [9,356 - (584 to 608)].

The following table presents Booz-Allen's assessment of annual baseline risks and a revised assessment by NGFA based upon the evidence presented in this section.

Booz - Allen's Calculation of Annual Baseline Losses Due to Causes Other than Fires and Explosions

Type of Accident	No. of Incidents Per Year	Estimated Willingness to Pay Per Incident	Baseline Loss to Society
Suffocation in bin	15	$ 3,500,000	$ 52,500,000
Other Deaths	28.5	3,500,000	99,750,000
Other lost workday injuries	11,524	34,100	392,968,400
TOTAL			$545,218,400

NGFA Revised Estimates of Annual Baseline Losses Due to Causes Other than Fires and Explosions

Type of Accident	No. of Incidents Per Year	Estimated Willingness to Pay Per Incident	Baseline Loss to Society
Total Deaths	19.5 - 21.0	$1.0 - 3.5 mil.	$ 19,500,000-73,500,000
Other Lost Workday Injuries	8,748 - 8,772	$25,000 - 34,100	$218,700,000-299,125,200
TOTAL			$238,200,000-372,625,200

D. Summary of Baseline Risks and Benefits

Comparison of Summary of Baseline Risk Assessments of Booz-Allen and NGFA

	Booz-Allen Annual Baseline Risk Estimates	Associated Deaths	NGFA Annual Baseline Risk Revised Estimates Based Upon Additional Data	Associated Deaths
Fires	148,232,503	3.6	49,555,885 - 67,482,910	0.9 - 1.7
Explosions	141,854,937	16.4	36,487,701 - 79,075,048	6.3 - 7.3
Other	545,218,400	43.5	238,200,000 - 372,625,200	19.5 - 21.0
TOTAL	835,305,840	63.5	324,243,586 - 519,183,158	26.7 - 30.0

Booz-Allen estimated total annual baseline risks to society from explosions, fires and other causes at $835,305,840. Booz-Allen also estimated the annual death risk at 63.5 lives (see table above).

A revised assessment, based upon additional data and what NGFA submits are more plausible assumptions estimates total annual baseline risk in a range of $324,243,586 to $519,183,158, with associated loss in lives of 26.7 to 30.0. Thus, we contend that Booz-Allen has overstated baseline economic losses by at least 61 percent and potentially by as much as 158 percent. Estimates of annual death risk are overstated by more than 100 percent. However, the overstatement of baseline risk is not the only source of bias in the Booz-Allen assessment of benefits.

E. Effectiveness

Booz-Allen's assumptions on the effectiveness of the standard in preventing fires, explosions, and other sources of accidental death and injury are extremely optimistic. Booz-Allen assumes that 100 percent of bin suffocation deaths would be prevented by the standard. Booz-Allen also estimates that over

70 percent of fires and explosion losses could be prevented by the proposed standards. Although Booz-Allen breaks down the benefits by various provisions of the standard, it did so by making assumptions that were inadequately explained. Beyond being merely unrealistic, this kind of breakdown of the benefits associated with individual provisions of the standard is impossible when analyzing fires and explosions. Since both fires and explosions require fuel and a source of ignition, and the proposed standard addresses both fuel and ignition, the two are inextricably linked.

Based upon its assumed effectiveness of the standard and its estimate of baseline risk, Booz-Allen presents the following table of estimated benefits on page II-14 of its report.

Booz-Allen's
Summary of Annualized Benefits for
the Proposed Standard by Location of Hazard

(Millions of 1982 Dollars)

Location/Source of Hazard	Annualized Benefits
Bucket Elevators and Grain Dryers	$ 63.7
Work Areas	
1/8 Inch Action Level	48.4
Once Per Shift Cleaning	25.1
Pneumatic Dust Control	(14.3)
Other Accidental Losses and Lost Workday Injuries	80.7
Total Benefits	
1/8 Inch Action Level	184.7
Once Per Shift Cleaning	161.4
Pneumatic Dust Control	91.3

In rejecting the hypothesis that benefits related to fires and explosions are separable by various provisions of the standard, the following table based on Booz-Allen's benefit assessment was generated.

[illegible]

[illegible]

	[illegible]	[illegible]
[illegible]	[illegible]	[illegible] [illegible] [illegible]
[illegible]	[illegible]	[illegible]

[illegible]

> [illegible]

> invariance in the percentage rates of decline implies much smaller absolute decreases in worker risks since the advent of OSHA[9].'

"Viscusi's review of the econometric evidence also concluded:

> There is good reason to be skeptical of any evidence showing that OSHA had an impact on job risk levels[10].

OMB states further, "To date, no careful assessment of OSHA safety programs has found effectiveness rates even one tenth as high as ADL and OSHA have assumed for grain handling standards."

OMB also makes the argument that OSHA's proposed standards for the grain industry are likely to be less effective than many of the industry standards already in place. OMB states, "There is no reason to believe that the grain handling industry is sufficiently different from industry in general to justify the 70 to 100 percent effectiveness assumptions compared to the zero to five percent effectiveness rates found in previous studies. In fact, there is reason to believe that there is *less* potential for OSHA safety rules to be effective in reducing risks in the grain handling industry.

"First, for half (or more, depending on the data source) of reported grain handling fires and explosions, the source of ignition is simply unknown. Furthermore, many of the causes are unlikely to be affected by the OSHA proposal or any other regulations."

Using OMB's review of economic literature on the general effectiveness of industry safety standards, the safety standard would result in a maximum annual benefits of $30.2 million (10% of $301.5 million). However, making this adjustment in estimated benefits only corrects for the bias caused by an overstatement in technical effectiveness of the standard. Considering the evidence we have presented that the baseline risks were also overstated by a large factor, the standards would likely result in maximum amount of benefits in a range of $11.7 million to $18.8 million and prevent potentially 2 to 3 fatalities annually in the grain handling industry.[11] It should be noted that even if the standard resulted in a level of effectiveness as high as 50 percent of that assumed by Booz-Allen, (more than five times as high as OMB contends is defensible) total annalized benefits would range from $59 million to $94 million, or between 25 and 39 percent of the standard's annalized cost of 240 million.[12] As caculated above, however, the more likely benefits are approximately 6-7 percent of the costs.

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[10] W. Kip Viscusi, *Risk By Choice: Regulating Health and Safety in the Workplace*, (Cambridge, Mass.: Harvard University Press, 1983) p. 31.

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[11] To correct for the overstatement of the baseline risks, the following calculations were made ($324.2 million/$835.3 million) x $30.2 million and ($519.2 million/$835.3 million) x $30.2 million. The figures, $324.2 million and $519.2 million, are the NGFA's estimates of the range in potential baseline risk. The estimate of the 2-3 fatalities prevented was made by applying an assumed maximum 7-10 percent overall effectiveness to baseline risk of 26.7 to 30.0 deaths per year.

[12] G.E.M. Consultants, Inc. and Midwest Research Institute (GEMCI-MRI), Economic Evaluation of OSHA's Grain Handling Standards, May 1984.

**NATIONAL
GRAIN & FEED
ASSOCIATION**

June 8, 1984

Docket Officer
Docket H-117
U.S. Department of Labor
Occupational Safety and Health
  Administration
Room S6212
200 Constitution Avenue, N.W.
Washington, D.C. 20210

The National Grain and Feed Association (NGFA) submits these comments in response to the Occupational Safety and Health Administration's (OSHA) January 6, 1984 notice of proposed rulemaking for grain handling facilities, 49 Fed. Reg. 996.

The National Grain and Feed Association is a voluntary association of grain and feed firms ranging in size from the smallest country elevator to the largest grain and feed complex. Included in its membership are country and terminal elevators, merchandisers, processors and exporters covering the wide spectrum of the grain and feed industry. The association's membership is comprised of 1,300 companies and 46 affiliated state and regional grain and feed associations that include more than 10,000 grain and feed companies nationwide.

The grain handling industry has been in the forefront of research designed to enhance safety. The industry is dedicated to promoting technological innovations, new practices, and safety training and education programs that contribute

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to safe and efficient grain handling operations. These programs are vital, first and foremost, to safeguard our human resources -- the employees who work in grain handling facilities.

The industry has demonstrated its commitment to safety. This was accomplished without specific OSHA grain handling safety standards. A much more effective approach has been taken by the industry -- through research, safety education and training programs. These programs provide the motivation to actually improve safety. OSHA's proposed safety standards and rules are not the answer -- they could, in fact, detract from safety because they are in many instances misdirected, technically infeasible and costly.

Because of our industry's commitment to safety, we do not shrink from letting the public know of the efforts which have been undertaken. They have been extensive. By the same token, the industry is determined to do its best to assure that misdirected and costly proposals which will remake the grain industry without making significant contributions to safety are not adopted. We are concerned that OSHA's proposed regulations, as currently drafted, fall into this category. The NGFA has identified particularly the proposed standards' provisions on housekeeping, bucket elevators, grates and emergency escape.

Our industry has carefully reviewed OSHA's proposal in terms of its technical feasibility, economic impact and ability to improve safety at grain handling facilities. We do not oppose certain provisions which have been proposed. Others, however, require extensive modification or elimination. Only if

OSHA adopts NGFA's recommendations and suggested revisions to the proposed standards will they significantly enhance safety in a cost-effective manner.

These comments deal with each section of the proposed regulation and supplement additional evidence that NGFA will present at OSHA's public hearings, which provides overwhelming support for the comments made and conclusions reached here.

Included with these comments are the following supplementary reports and scientific data:

Attachment 1 - Chronology of National Grain and Feed Association's participation in OSHA Rulemakings Involving the Grain Industry.

Attachment 2 - National Grain and Feed Association's Economic Analysis of the Benefits of OSHA's Proposed Grain Handling Standard.

Attachment 3 - National Grain and Feed Association's Request for Administrative Stay and Comments on the Applicable and Nonapplicable Provisions of OSHA's Marine Terminal Standard.

Attachment 4 - Status of Fire and Explosion Research Council's Research Projects and one copy of the following research reports published by the National Grain and Feed Association:

--BRC-83-016 "Analysis of Bearing Utilization in the Grain Handling Industry"

--CGC-80-011 "A Survey of Grain Elevator Facilities for the Presence of Combustible Gases/Vapors"

--CGC-81-012 "A Survey of Fumigant Levels in Grain Elevators Following Fumigation"

--DCE-82-076 "Reducing Dust Concentrations in Bucket Elevators by Prior Screening or Aspiration of Wheat"

--DCE-83-077 "Smoldering Combustion as Related to Grain Elevator Safety"

--DCE-83-078 "Feasibility of Smoke Detector Use in Grain Facilities"

--EDC-79-007 "A Practical Guide to Elevator Design"

--ESV-81-066 "Explosion Venting and Suppression of Bucket Elevators"

--ESV-83-068 "Maize Starch Explosion Experiments in a Vented 500m^3 Storage Bin"

--ESV-83-067 "Dust Explosion Propagation in Simulated Grain Conveyor Galleries"

--GDU-79-026 "Grain Dust Utilization: A Literature Survey"

--GDU-81-027 "Current Utilization of Grain Dust"

--OAC-82-036 "Examining the Use of Additives to Control Grain Dust"

--SMS-80-046 "Electrostatic Characterization of Grain and Grain Dust"

--SMS-80-047 "Study of Static Electricity on Grain Conveying Belts"

--SMS-81-048 "Survey of Literature on Ignition of Dusts by Friction and Impact Sparks"

--SMS-81-049 "Grain Dust Ignition by Frictional Sparks"

--SMS-82-050 "Electrostatic Grounding Characteristics of Grain Facilities"

--SMS-83-051 "Electrostatic Hazards Inside Grain Storage Bins"

Dust Control for Grain Elevators, National Grain and Feed Association, 1981

Part 1917 - Marine Terminals

OSHA proposes to incorporate the standards for grain handling facilities (1910.272) within the marine terminal standard (Part 1917). The NGFA has filed extensive comments with OSHA on our views regarding the inappropriateness of applying the marine terminal standards to grain facilities. These comments are again submitted to OSHA for consideration during the grain handling standards rulemaking.

Portions of each of these standards address similar hazards; therefore, two different standards, which overlap and are duplicative or inconsistent in places, will apply to grain facilities operating along coastal or inland waterways. Application of multiple OSHA standards to grain handling facilities will be confusing and will present numerous compliance problems for grain companies, especially when designing and implementing company-wide safety and training programs. Grain handling facilities, whether located on waterways or inland, are designed and operated in essentially the same manner and should not be subject to two different standards which address the same work practices and equipment. The NGFA believes that a single set of safety regulations is sufficient for grain handling regardless of the geographic location of the facility.

Additionally, there are numerous sections of the marine terminal standards which are not applicable to grain elevators. Although these provisions appear to address equipment or operations at grain facilities, the requirements are not directly applicable because of the unique nature of grain handling operations, which differ significantly from general cargo handling.

The NGFA believes that OSHA has not adequately addressed the grain industry's concerns, nor fully assessed the economic impact of the marine terminal standards. The NGFA continues to believe that the marine terminal standards do not address the potential hazards at grain facilities and thus should not be applicable to grain facilities loading or unloading waterborne vessels.

It is not sufficient to state generally that the grain handling standard will take precedence over the marine terminal standard. Far too many provisions overlap but are not identical or designed to deal with identical hazards. The result of such a general statement is controversy and disagreement over which provisions cover the same hazards and which provisions should be supplemental. The marine terminal standard should not apply at all to grain handling facilities.

If, however, OSHA determines to continue to apply the marine terminal standards, then NGFA recommends that a new section be added to 1917.1(a) as follows, listing the sections of Part 1917 that are inapplicable to marine grain terminals either because they address hazards not found at grain terminals or are duplicative.

1917.1(a)(3)(i) Part 1910.272 of this chapter shall apply to a marine terminal operating as a grain handling facility.

(ii) The following provisions of Part 1917 do not apply to a marine terminal operating as a grain handling facility: .13; .14; .15; .17(a)-(f), (h), (k) and (l); .18; .22; .23; .24; .25; .27; .41; .42(a) and (c)-(k); .43(c), (d), (g) and (h); .44(c), (d), (f), (g) and (i)-(m); .45; .46; .48(a)(1) and (b)-(g); .49(a)-(i) and (k); .50; .71; .73; .114; .115; .118; .121; .123; .124; and .153.

(a) Scope

The terms "grain handling facilities" and "maritime employments" are not defined in the proposed standard and could lead to confusion regarding the applicability of the standard. Employees at grain facilities are not maritime employees. Maritime employees already are regulated under 29 C.F.R. 1918. NGFA recommends that these terms be deleted and section (a) be changed to read:

(a) Scope. This section contains requirements for the control of fires, grain dust explosions and other safety hazards associated with grain handling.

(b) Application

OSHA proposes to apply the proposed standards broadly across many diverse segments of the grain and feed industry. NGFA believes that the standards and their applicability must be revised to prevent needless overregulation. Many of the proposed requirements will present significant compliance burdens for the many types and sizes of grain handling facilities included under the standard, without demonstrated safety benefit.

OSHA's own economic and regulatory impact analyses demonstrate that a disproportionate and overwhelming economic burden will be placed upon small grain facilities, especially country elevators. NGFA's economic analysis shows that OSHA's economic cost projections for meeting the proposed standards are vastly understated and the benefits are greatly overstated. The G.E.M. Consultants, Inc. and Midwest Research Institute (GEMCI-MRI) economic evaluation of OSHA's proposed grain handling standards conducted for NGFA concludes that a standard containing the 1/8th-inch grain dust criterion would require an initial cost of $556 million, of which $316 million would be needed for country elevators. The recurring cost for this 1/8th-inch standard would total nearly $270 million, $104 million of which is attributable to country elevators.

If all facilities were to adopt a once per shift sweeping criteria, the cost would be $157 million initially, with $130 million applicable to country elevators. The intensive labor effort required for once per shift cleaning would cause a recurring cost of $315 million, of which nearly $90 million is attributable to country elevators.

OSHA's own consultants state that a standard with only a pneumatic dust control requirement would create an initial cost of over $2.47 billion. Because such a proposal is not feasible, its cost was not analyzed by CEMCI-MRI.

Many NGFA members have conducted cost studies at their own facilities. The vast majority of country elevator operators are estimating initial costs in excess of $100,000 to comply with the standards. These letters have been submitted to the docket, and the costs should be compared to the major profits which Arthur D. Little concluded that country elevators earn.

The benefits from the standard are greatly overstated in the economic impact studies conducted for OSHA. The NGFA study, which has been submitted, clearly shows very little benefit for much of the standard. Costs outweigh benefits by a rate of approximately 15 to 1.

OSHA, therefore, should reconsider the applicability of the standards and revise the proposed rules to reduce their devastating effect upon the industry, especially small facilities. Some of the provisions of the standards should be deleted, others should not apply to existing or small facilities, and others still need to be revised completely or deleted.

The preamble to the proposed rules states that there is "a considerably lower likelihood of death in small facilities." Yet the total cost of the standard proposed by OSHA would be highest for small facilities. Many of these facilities will have to cease operations if the standard, as proposed, is adopted.

OSHA must recognize the extreme economic burden of the proposed standard upon smaller and many existing facilities and provide economic relief in the form of exemptions, grandfathering and time extensions for compliance.

There are four major provisions of the proposed standard that present the greatest economic burden on grain facilities. These are: housekeeping, bucket elevator, emergency escape and grating. The NGFA believes that these requirements as proposed are not economically feasible for most facilities particularly many smaller and other existing facilities, and therefore, these facilities should receive relief from the provisions as proposed. Further, these four provisions will need to be substantially rewritten to make them achievable for any facility to which they are applied. There are many other alternatives to provide the degree of protection needed for these four major provisions which will be discussed later in these comments.

(c) Definitions

The NGFA offers the following comments regarding the definitions of terms and the way the terms are used in the standard.

(c)(1) "Acute debilitating health effects." The NGFA recommends that this term be deleted since it is vague and will create compliance difficulties for employers trying to develop and implement workable bin entry procedures.

(c)(2) The definitions for "choked leg," and "jogging" as well as the bucket elevator provision in (p)(1) address potential problems of grain or material build-up in the boot section of a leg which prevents bucket elevator movement. In the case of a "choked leg," grain flow into the leg exceeds the ability of the bucket elevator and associated discharge and conveyance equipment to maintain material flow. The corrective action necessary to allow proper grain flow before restarting includes cleaning of the boot section, and in the event of plugging, clearing of the discharge spout or discharge conveyances associated with the bucket elevator. Simply having grain in the buckets of the upleg should not be defined as part of a choked leg condition, as which the proposed definition now implies. Emptying grain from the up-leg is not necessary for safe restarting of the leg; bucket elevators are designed to be able to start up under full load. NGFA recommends that the ambiguities in the "choked leg" and "jogging" definitions be clarified by the addition of the following statement to the current definition for "choked leg":

> "A bucket elevator that has the up-leg partially or fully loaded and has the boot and discharge cleared allowing bucket movement is not considered choked."

(c)(6) and (c)(9) Bucket Elevator Definitions. The definitions of "inside bucket elevator" and "partially-inside bucket elevator" are overly inclusive. There are very few bucket elevators where both the head and boot pulleys are located totally outside of the grain handling structure. Under the OSHA proposal, the only bucket elevators that would not be regulated are free standing dryer legs or bucket elevators used at sites outside temporary storage. NGFA recommends that the many facilities which were designed and constructed to have as much of the legs as practicable outside the elevator structure possess inherent safety features and do not need to be regulated under the bucket elevator requirements. The proposed definition for "partially-inside bucket elevator" inappropriately includes many outside bucket elevators which do not present the explosion hazards that these proposed rules are designed to address. NGFA, therefore, recommends deletion of the definition and requirements for "partially-inside bucket elevators."

To properly differentiate between inside and outside bucket elevators, the NGFA recommends that the following sentence be added to the definition of (c)(6) "inside bucket elevator":

> A bucket elevator with the head section located outside and having 80 percent or more of the total leg height above grade outside of an enclosed grain receiving or handling structure is not an "inside bucket elevator" regardless of the location of the boot pulley.

(c)(10) The "small elevator facility" definition should be changed to include all small facilities. This change is needed so that the definition can be used as a basis for providing necessary exemptions and time extensions for smaller facilities to meet various provisions of the proposed rules. In addition, this definition could help alleviate the economic burden of the standards on all small facilities.

Temporary grain storage outside the permanent grain handling structure presents no explosion risk since there are no structures around handling equipment and in many cases are totally separated from the rest of the facility. These should not be considered a part of the facility's permanent storage capacity. Further, NGFA recommends that the throughput portion of the definition for small facilities be based upon a three year average. Grain volumes can vary greatly from year to year depending upon crop yields and the business climate. Throughput should be defined as the total bushels of bulk raw grain received, and shipped divided by two. NGFA's recommended language for (c)(10) is as follows:

> (c)(10) "Small facility" means a facility which has less than 1 million bushels of permanent storage capacity and less than 4 million bushels throughput averaged over the past three years. Throughput is the total bushels of bulk raw grain received and shipped divided by two.

(d) Emergency Action Plan

The NGFA supports the concept of emergency planning and believes that emergency planning is a major safety component of worker education and training. OSHA, however, refers to section 1910.38(a) of the General Industry Standards for developing and implementing an emergency action plan; rather than incorporating this provision by reference, thereby creating uncertainty as to whether other portions of 1910.38 apply. OSHA should expressly state the required elements of an emergency action plan for grain handling facilities. We would be pleased to assist OSHA in identifying fundamental elements of an emergency action plan.

(e) Training

The NGFA has been a long-standing advocate of employee training and education programs to aid in hazard recognition and help control human error. Training is a very effective means of achieving safer grain handling operations.

The NGFA, however, believes that OSHA is proposing that employers provide training that is unnecessary for many of the employees at grain facilities whose job assignments do not require it. There are many job assignments of which many have a degree of job specialization at grain handling facilities. Every employee does not necessarily need to know all of the company's procedures for clearing choked legs, housekeeping, preventive maintenance or lockout/tagout. Training should be required only for those employees whose job assignments may necessitate the need to know and act on these procedures. Requiring safety training that is not needed for performing job assignments will negate the effectiveness of necessary safety training and education by creating information overload for employees.

To eliminate interpretation and compliance problems, NGFA recommends that some of the itemized training procedures of (e)(1)(ii) be placed in (e)(1)(i) and that training of employees in safety procedures and practices be required only if it is associated with the employee's work task. The term "shall assure" in (e)(1) and elsewhere in the proposed standard also should be deleted because it places an onerous compliance burden on employers that cannot be met. No employer can reasonably be expected to assure the performance of an employee. An employer can instruct employees in proper procedures. NGFA recommends the following language for section (e)(1):

> (e)(1) The employer shall provide employees training at least annually and when changes in job assignment will expose them to new hazards. Current employees, and new employees prior to starting work, shall be trained in at least the following:

(i) Procedures and safety practices established by the employer including, but not limited to, rules pertaining to smoking and other common ignition sources.

(ii) Recognition of and preventive measures for the safety hazards which are associated with their work task. Training where applicable includes, clearing procedures for choked legs, housekeeping program procedures, hot work procedures, preventive maintenance program procedures and lockout/tagout procedures.

(f) Permit Systems

A permit system can be a valuable tool in raising the awareness of employees to the potential hazards of a job assignment involving welding and bin entry. Permit systems are particularly useful when the nature of a facility's operation results in several employees working in areas or job assignments that may overlap or interact. However, OSHA should recognize that most one and two person operations (common at grain handling facilities) will not benefit from a permit system since it would merely result in a need to approve their own safe work procedure. Education and training is a more effective means of preventing accidents from unsafe work practices at smaller facilities.

NGFA believes that employers should be allowed to designate areas that are safe for welding and designate those bins, silos and tanks that require a bin entry permit. There are many areas around and near a grain facility other than welding shops that are safe for performing welding because of the absence of explosion hazards. Many bins, tanks and silos do not constitute a bin entry hazard, since there is no risk of being trapped in the grain and suffocating or of a hazardous atmosphere. For instance, most large diameter steel or concrete tanks and flat storage structures do not contain hopper bottoms for emptying grain. These tanks do not pose the risk of grain suffocation presented by vertical storage bins. Most of the large tanks must be emptied or cleaned out at ground level through large doors using front end loaders or other portable bulk material handling systems. The large open doors provide assurance of natural ventilation. In these cases, the bins do not represent the bin entry hazards being addressed by these standards.

NGFA recommends that OSHA change the proposed rules to allow employers to designate the bins requiring a bin entry permit. This would alleviate the need for extra personnel to be present as observers outside of bins not requiring a permit during unloading operations, maintenance, housekeeping or grain inspection and inventory procedures. NGFA, therefore, recommends that the language in (f)(1) be changed to state:

> "The employer shall develop and implement a permit system for hot work, except for hot work performed in welding shops and other areas specifically authorized by the employer, and for work requiring entry into bins, silos, and tanks as identified by the employer."

NGFA also recommends that the following language be added to paragraph (f)(2)(ii):

> (ii) Entry into bins, silos and tanks must meet the requirements contained in paragraph (g) of this section when there is reason to believe that there may be an atmosphere, equipment or material hazard. The employer shall designate which bins, silos and tanks will require a permit.

(g) Entry into Bins, Silos and Tanks

Avoiding accidents in confined areas of a work place is an important part of a safety program, because of the hazards of confined spaces and the difficulty of rescue operations. Employers, however, cannot assure employee behavior but rather, must depend upon education and a commitment to safe practices from everyone. NGFA recommends that the phrase "shall assure" be deleted from all requirements. Further, (g)(1) should include the employer designated bin concept discussed in the previous section for permits and entry procedures as follows:

> (1) The employer shall direct employees to take the following precautions before employees enter bins, silos, and tanks designated as needing a permit:

As discussed earlier, NGFA believes that the terminology "acute debilitating health effects" is too vague. There is no single device or instrument that is practical for use at operating grain facilities which can test for levels of all possible combustible gases, toxic agents and for an oxygen deficiency. To accomplish atmospheric testing for all possible levels of gases or agents will require the use of several devices. Therefore, testing should only be done when there is reason to believe that an atmospheric hazard could exist. Accordingly, paragraph (g)(1)(iii) should be modified as follows:

> (iii) Where there is reason to believe that the oxygen level is less than 19.5 percent or if combustible gas or vapor is detected in excess of 10 percent of the lower flammable limit, or if toxic agents are present in excess of the levels listed in Subpart Z of this Part.

OSHA proposes that employees acting as observers during bin, silo and tank entry be trained in rescue procedures. NGFA believes that the rescue training requirement, contained in paragraph (g)(5) adequately addresses the training necessary. Subparagraph (g)(6) is particularly burdensome for smaller facilities which have only two employees. Many small facilities rely on the local emergency services to provide CPR services.

This requirement also raises some liability questions for CPR trained employees as well as the employer. For example, in Alabama, the employee administering CPR could be personally liable for his or her unsuccessful efforts. See Grantham v. Denke, 359 So.2d 785 (S. Ct. Ala. 1978).

CPR training requires frequent practice and follow-up to maintain competence. We question whether it is reasonable to expect a continuing level of competence from grain elevator workers as opposed to medical technicians or trained emergency personnel. Some grain firms do favor CPR training and offer it at some locations to employees on a voluntary basis. However, even these firms oppose a mandatory CPR training provision. NGFA recommends that subparagraph (g)(6) be deleted.

(h) Contractors

The NGFA believes in the need to inform contractors of the potential fire and explosion hazards and the applicable safety rules of the facility. The contractor must be responsible for the action of his own employees and must relay any safety information passed on by the grain facility employer. However, to prevent ambiguity and to prevent the unnecessary extended exchange of information, NGFA recommends that (h)(1) be revised as follows:

(1) The employer shall inform contractors performing work at the facility of the potential fire and explosion hazards which may affect their safety or that of others. The employer shall...

(i) Housekeeping

The NGFA views the proposed housekeeping requirements as unworkable in terms of both economic and technical feasibility. Housekeeping is the single largest cost associated with the proposed standards, accounting for 67 to 97 percent of the cost, depending on which option is used, yet provides questionable benefits for improving safety. The NGFA believes that these requirements must be significantly redirected to minimize their impact upon the industry and to provide a true performance guideline for facility operators.

Housekeeping, which consists of removal of layered dust accumulations and reduction of airborne dust generation, is an ongoing part of a grain facility's operations for many reasons including safety, health, environmental air quality, product loss control and sanitation. The industry recognizes housekeeping as an important component of an overall safety program. However, the NGFA believes that the proposed housekeeping provisions are vague and misdirected, present compliance difficulties and will not provide the level of safety benefits claimed.

Undue Emphasis on Dust Control and Lack of Scientific Merit

First, the proposed standard has given too much emphasis to housekeeping and dust control as a means to control fire or explosion hazards. The statement in the preamble that "dust control is the most effective and fundamental means of reducing the number of dust fires and explosions" is a truism, but illustrates OSHA's undue emphasis on housekeeping as the means to control grain dust fires or explosions. Housekeeping and dust control address only one of the explosion elements -- the fuel. There are many options to help minimize the occurrence or characteristics of an explosion, including education and training, control of ignition sources, suppression, facility design and layout and monitoring equipment. The National Academy of Sciences said general dust control will only result in preventing 10 percent of explosions; yet the proposed regulations have dust control accounting for 90 percent of all costs.

Research shows that there is no "safe" dust level which would prevent flame or explosion propagation that could be achieved or maintained in a grain handling facility. OSHA recognizes this fact in the appendix and the preamble to the proposed standard, noting there is no "safe level" of dust and recognizing the hazards of even 1/8th of an inch of dust.

Housekeeping addresses only one of the four explosion elements -- the fuel. A research project sponsored by the NGFA's Fire and Explosion Research Council found that even when extensive efforts are made to clean or remove dust from grain prior to handling in bucket elevators, explosive levels of grain dust can recur each subsequent time grain is handled.

An earlier research project, conducted by Cargill, Inc. for the U.S. Department of Agriculture, examined the levels of dust concentrations that occur in bucket elevators. This research indicated that bucket elevators frequently have explosible concentrations. The results were reported in a study by Wade and Hawk, "Investigation to Determine Dust Concentrations and Characteristics Inside Enclosed Work Areas and Equipment," Department of Agriculture, 1979.

NGFA, through its Fire and Explosion Research Council, sponsored a subsequent study of dust in bucket elevators. This research was conducted by Cargill, Inc. and reported in a study entitled, "Reducing Dust Concentrations in Bucket Elevators by Prior Screening or Aspiration of Wheat." Grain, which was cleaned by aspiration or screening before initial handling in a bucket elevator, exhibited dust concentrations in excess of 40 grams per cubic meter upon subsequent handling. Therefore, even when grain was extensively cleaned, new dust was generated and additional dust became airborne upon subsequent handlings. This study demonstrates that grain dust is an inherent part of grain and grain handling. The only known way to completely avoid generation of grain dust is to not handle or move grain.

Another research project, entitled "Dust Explosion Propagation in Simulated Grain Conveyor Galleries," performed for the NGFA by Factory Mutual Research Corporation, found that less than 1/100th of an inch of grain dust is sufficient to fuel the spread of a flame front. The report states: "The experiments in the large-scale facility essentially reconfirmed the fact that low values of dust loadings are capable of supporting flame propagation in an elongated structure. In this case, flames were observed to reach to the open end of the gallery for nominal fuel concentrations of 77 grams per cubic meter, corresponding to a layer of cornstarch 1/100th-inch thick."

Although cornstarch was tested as a worst case condition, its particle sizes and physical and explosive characteristics were considered similar to that of other grain dusts. These full scale tests, in an 8 feet by 8 feet in cross section and 80 foot long gallery structure, clearly demonstrated the fallacy of relying on housekeeping as the sole or prime method for reducing explosion risks.

Further, the Factory Mutual research conducted for the NGFA indicated that less than 62 percent of the 1/100th-inch dust layer was "picked up" from the gallery floor. Only a fraction of the dust "picked up" actually was involved in the flame combustion process of the gallery explosion test. This data suggest that a fraction of 1/100th of an inch of dust can fuel a flame front. When obstacles were placed in the gallery, large amounts of dust were "picked up," suggesting even smaller dust layer thicknesses would be sufficient to fuel the combustion process.

These minute dust layers cannot be avoided in operating grain facilities. Clearly a 1/100th-inch action level is not obtainable or practicable in an operating facility. Therefore, too much reliance on housekeeping or dust control would be a mistake. Rather, we believe that a more balanced approach which addresses all elements of an explosion is more prudent.

This is not to say that the NGFA doesn't believe that housekeeping is an important part of an overall safety program. We do. But we believe that it is only one part of a safety program which should address as many elements of an explosion as possible. Imagine if you were required to spend the great majority of your safety budget each year trying to comply with an illusive dust layer standard that research has conclusively shown will not eliminate the risk of an explosion.

As demonstrated by these scientific data, grain dust -- the fuel of fires and explosions -- cannot be totally eliminated to the extent necessary to ensure that the propagation of an explosion will not occur. That's why we think that OSHA's mistaken preoccupation with "minimizing" or "eliminating" grain dust -- an impossible goal -- could have the opposite of its intended effect. That is, it could focus undue attention and the vast majority of elevator management's available funds on a single explosion element,that cannot be eliminated. Moreover, OSHA's mistaken preoccupation with "minimizing" this single explosion element could lead to a false sense of security in grain handling facilities by overly emphasizing housekeeping, when it provides only questionable safety benefits.

There are many factors that influence the characteristics of a grain dust explosion. Some of those which directly relate to the fuel -- grain dust -- include the strength of the primary explosion; facility design; the amount and condition (moisture, compaction and agglomeration) of the dust available to fuel the explosion or flame front; the intensity of the ignition source; and the presence of suspended dust concentrations. OSHA's housekeeping proposal only accounts for the amount of fuel present in layers or airborne concentrations. Controlling this factor will not necessarily decrease the incidence of or lessen the extent of dust explosions.

There is No Scientific Basis for OSHA's 1/8th-Inch Action Level

Second, OSHA cannot justify through any research or scientific evidence the establishment of a 1/8th-inch "action level" for fugitive grain dust. As stated earlier, research has shown that a dust layer of as little as 1/100th of an inch of grain dust is sufficient to fuel an explosion. Two sources OSHA apparently relied on for the 1/8th-inch dust criteria -- the Canadian Grain Handling Guidelines and Factory Mutual Guidelines -- are not regulations and were established without research or scientific data. The 1/8th-inch action level will not prevent or necessarily lessen the effects of an explosion or fire.

OSHA itself admits in its proposal that it:

> "does not believe that any level of dust accumulations can be considered completely safe. However, OSHA also realizes it is not feasible, and may be impossible, to remove all dust accumulations at all times."

We agree with this statement. Housekeeping cannot be a continuous process; nor can elevators be shut down every time a 1/8th-inch level occurs because of grain spills or dust. On the basis of the NGFA's technical analysis, Fire and Explosion Research data, and economic study, we have concluded that the industry cannot feasibly comply with OSHA's proposed 1/8th-inch action level. We believe the 1/8th-inch action level will lead to numerous nuisance citations for the industry with no measurable benefit to reducing fire or explosion risk.

OSHA's Proposal Provides No Options

Third, despite statements to the contrary, OSHA's proposed standards do not provide options for employers to meet the housekeeping standard, since the regulation requires operators to minimize both airborne and layered dust within the facility. In the preamble to the proposed standards, OSHA states:

> "The housekeeping program must specify the methods which will be used to control airborne dust emissions, as well as the frequency and methods which will be used to remove dust accumulations." (emphasis added.)

For all practical purposes, this suggests that the housekeeping "options" contained in the proposed standard (i.e., sweeping once per shift or utilizing pneumatic dust control) are not options at all. Selecting one of these options would not eliminate a facility's obligation to meet the OSHA-proposed 1/8th-inch dust action level, unless dust control systems also were utilized to control airborne emissions and to prevent dust accumulations. Further, a 1/8th-inch grain dust level easily could be exceeded unknowingly in a facility in a short time, even if the plant were equipped with extensive pneumatic dust control systems. Thus, the only way to meet the housekeeping provisions would be to implement both the sweeping and pneumatic dust control "options."

This is conceded by OSHA because every economic analysis that OSHA or its consultants has performed as well as the National Academy of Sciences panel assumed that both dust control and sweeping would be required to meet the 1/8th-inch action level. The OSHA Regulatory Impact Analysis itself states that "manual housekeeping alone may not be sufficient to control dust at the level required." Thus, it is misleading for OSHA to suggest that sweeping alone is a viable option under the proposed rule.

Sweeping once a shift, if an option at all, would mandate the employment of additional personnel at all facilities, which would greatly increase operating costs. This option, in terms of labor and recurring cost, is even more costly on an industry-wide basis, than the 1/8th-inch action level option on an annualized basis, since a greater degree of cleaning activity would be required than under the 1/8th-inch action level criteria.

Another major problem in the housekeeping provision is OSHA's statement that dust control systems would be required to achieve "zero visible emissions." Presumably, this means that no airborne dust concentrations or dust layers would be permitted to accumulate at any level, regardless of how minute, under the pneumatic dust control "option" -- a totally impractical and impossible-to-achieve requirement.

Housekeeping Requirements are Vague

Fourth, OSHA's 1/8th-inch grain dust action level option is vague. Only minimal guidelines are given as to how the dust layer thickness is to be determined. Further, the provision does not require that the floor area must be contiguous so that various small floor areas could not be selected and totaled to distort a dust layer average. A single area where dust exceeded 1/8th-inch could subject the employer to a citation. Since housekeeping cannot be a continuous process nor can elevator operations be shut down every time a 1/8th-inch level occurs due to spillings or dust, this provision in essence dictates the use of pneumatic dust control equipment.

The preamble and the appendix to the proposed standard indicate that OSHA intends to regulate both *airborne* and *layered* dust under housekeeping. As mentioned previously, the preamble states that a "housekeeping program must specify the methods which will be used to control airborne dust emissions as well as the frequency and methods which will be used to remove airborne dust accumulations." Further, the standard requires a program that "will minimize fugitive grain dust accumulations." OSHA recognizes in its two economic studies that the proposed housekeeping program constitutes more than sweeping of floors, but also includes requirements for dust collection systems. NGFA, therefore, questions whether in fact there are any options for meeting the housekeeping provision, or whether dust control and manual housekeeping would be required in *all* cases.

Housekeeping Options are not Cost-Effective

We believe there are more cost-effective and realistic alternatives to the OSHA proposal that will not put large numbers of facilities out of business.

The housekeeping provisions are the most costly in the proposed standards. The results of the NGFA's economic impact survey indicate that OSHA's projected costs for housekeeping are greatly underestimated. In its various economic impact studies, OSHA's consultants estimate the cost of the proposed housekeeping provisions alone would be between $56 million and $950 million. The economic impact study conducted by Arthur D. Little, Inc. for OSHA found that the cost of adopting an even more stringent grain dust "action level" of 1/64th-inch -- which has been advocated by some -- would cost the industry $5.8 billion.

Booz-Allen's study of the cost impacts of the proposed OSHA standard on grain handling facilities indicates annualized cost as being over $113 million to meet the 1/8th-inch dust criteria and $56 million to meet a once per shift sweeping option.

The economic study completed for the NGFA by GEMCI-MRI which will be submitted with our testimony to be presented at the OSHA public hearing in Kansas City, shows that the OSHA housekeeping costs are drastically understated. Over 812 responses to a written survey were used to make this economic analysis. This economic analysis shows that the initial cost to comply with a 1/8th-inch action level provision would exceed $399 million, with an annual recurring cost of more than $263 million. Booz-Allen found initial costs of $149 million and a recurring cost of $134 million for the 1/8th-inch action level provision. The Booz-Allen analysis for OSHA understates the cost of this "option" by more than 200 percent.

The GEMCI-MRI economic analysis shows that a once per shift cleaning option is labor intensive and will require a recurring cost in excess of $308 million.

Booz-Allen's annual recurring cost for sweeping once per shift was less than $71 million. This clearly shows that OSHA and its consultants vastly understated the costs of the standards.

Booz-Allen calculated an initial cost for the pneumatic dust control option exceeded $2.4 billion, with an annual recurring cost of $237 million. The NGFA believes that this cost also is understated greatly, but chose not to go through the economic exercise since this is clearly much too costly for the industry and would not be selected as a viable option.

Redirecting Housekeeping Provisions

The NGFA believes that OSHA's housekeeping proposal must be redirected, if it is to be cost-effective in improving safety. The NGFA opposes the establishment of arbitrary housekeeping criteria, including the three so-called housekeeping "options" proposed by OSHA. However, the NGFA does believe that grain handling facilities should develop and implement a written housekeeping program that specifies the areas and frequency of checking and cleaning by using sweeping, dust control or a combination of methods to reduce dust accumulations.

Because the location of the layered dust plays a role in the propagation of an explosion, a housekeeping program could identify the need for more frequent housekeeping near potential ignition sources or areas adjacent to operating machinery. Attention could be directed toward dust accumulations on equipment which has the greatest potential for overheating or malfunctions or towards dust accumulations in areas around and adjacent to bucket elevators, enclosed conveyors, etc. Housekeeping schedules established by facility management for these and other areas could be substituted for a specific dust level.

The NGFA urges that extensive changes be made in the housekeeping provisions. Otherwise, the very survival of existing facilities is in jeopardy. The NGFA recommends that the dust control provisions in (i)(1) and (i)(2) be deleted and that they be replaced with a single performance provision which states that: The development and implementation of a written housekeeping program which specifies the areas and frequency that areas will be checked and/or cleaned, and which specifies dust control and cleaning methods to be used to reduce dust accumulations on floors, equipment and other horizontal surfaces.

(j) Grate Openings

Grates over receiving pits are utilized by the grain industry for two purposes: 1) to prevent injury to personnel and 2) to remove foreign objects from the grain. A maximum grate opening of 2 1/2" in one direction is sufficient to serve the first purpose. To meet the second purpose, various sizes of grate openings may be selected to remove foreign objects based upon a facility's design and the subsequent grain handling devices. However, very little information is available which suggests the efficiency of various size grate openings for removing foreign objects from grain. There is no scientific evidence to support the effectiveness of one size grate opening over another for removing foreign or ferrous objects from the grain.

Prevailing industry practice is to utilize grates having a 2 1/2" opening in one direction. There is no information available which suggests that the current industry practice needs to be changed. To gain greater knowledge of the efficiencies of various grate sizes in removing foreign objects, the NGFA Fire and Explosion Research Council has undertaken a study to examine the grate sizes that are currently utilized in the industry and to research various length and width openings for their ability to remove foreign objects commonly found in grain.

The Fire and Explosion Research Council's study compiled information from 152 grain facilities having 393 receiving grates. It was found that less than 50 percent of receiving pits at grain facilities have either magnets or 2 1/2" by 2 1/2" grates and that less than 8 percent of the facilities' grates would meet a 2 1/2" by 2 1/2" requirement. However, more than eighty percent of the receiving pits are protected by grates that have a maximum of 2 1/2" opening in one dimension.

NGFA recommends that any grate opening requirement stipulate a maximum opening of 2 1/2" in only one direction. This will provide the employee walking surface safety, remove foreign objects from the grain, and also will allow an efficient level of grain flow for most grains. Any grating requirement should continue to allow the use of magnets as an option.

In addition, because of the potential costs of the proposed grate requirements and the questionable benefits, these requirements must be changed. NGFA's economic analysis based on a survey of over 800 facilities indicates that the grating requirement would cost in excess of $11 million. Booz-Allen's cost estimate was an understated $1.6 million.

Additional time is needed for facilities to comply with any grate opening provision. Obtaining estimates and locating alternative grates or magnets (if available) will necessitate more than the current 90-day period allotted for facilities to meet the standard. NGFA recommends that affected facilities have at least one year to meet any grating requirement.

The NGFA recommends the following language for provision (j):

...The width of the openings in the grates shall be a maximum of two and one-half inches. Larger openings in grates are permissable where magnets are used to remove ferrous material from the grain stream.

(k) Filter Collectors

The NGFA believes that grandfathering filter collectors from the requirements in section (k)(2) is necessary and should be retained.

(l) Preventive Maintenance

The NGFA believes that preventive maintenance is an invaluable tool for more efficient and safer operations. Education and training, which should accompany a preventive maintenance program, will instill a greater awareness of potential hazards that may be caused by equipment malfunctions.

The NGFA, however, believes that it is impossible for any maintenance program to "assure" continuous safe operation. Even under the best of conditions, preventive maintenance does not guarantee that equipment will operate 100 percent without a failure.

NGFA recommends that the phrase "to assure continued, safe operation" be deleted from (l)(1)(ii) such that the preventive maintenance program will consist.of: (ii) Lubrication and other appropriate preventive maintenance of the equipment.

(n) Emergency Escape

The General Industry Standards, specifically sections 1910.35 - 1910.37, address emergency egress and its importance when designing, building and operating a building or structure. These sections provide a thorough and effective discussion of what areas are required to have an exit or exits and how means of escape must be designed, located and maintained. Two provisions in section 1910.36 (in conjunction with the remainder of these sections) address the requirements of emergency exits which OSHA attempts to repetitively address in the proposed grain handling standards.

Section 1910.36(b)(3) states that:

> Every building or structure shall be provided with exits of kinds, numbers, location, and capacity appropriate to the individual building or structure, with due regard to the character of the occupancy, the number of persons exposed, the fire protection available, and the height and type of construction of the building or structure, to afford all occupants convenient facilities for escape.

Section 1910.36(b)(8) more specifically addresses the need for exits based upon occupancy by stating:

> Every building or structure, section, or area thereof of such size, occupancy, and arrangement that the reasonable safety of numbers of occupants may be endangered by the blocking of any single means of egress due to fire or smoke, shall have at least two means of egress remote from each other, so arranged as to minimize any possibility that both may be blocked by any one fire or other emergency conditions.

Booz-Allen states in its economic impact statement that emergency escape requirements are "not as stringent as existing provisions under Subpart E of the General Industry Standards regarding means of egress." However, by attempting to shorten these provisions from the detailed requirements of Subpart E, OSHA is extending the requirements by specifically stating that various segments of grain handling facilities must have "at least two means of escape." The grain industry would be removed from the general industry provision which requires that exits are to be provided based upon "size, occupancy and arrangement" and made subject to a mandatory provision that two exits must be provided regardless of occupancy.

In addition to specifically requiring "at least two means of escape," OSHA deviates from the General Industry Standards by identifying the areas which must have two exits. OSHA proposes that all "tunnels, galleries, scale floors, and work areas normally occupied by employees" must have two exits. No longer could the industry provide exits based upon occupancy, but rather every tunnel in the industry, many of which extend only to the center of a bin, and are rarely occupied, would be required to have two exits.

The addition of exits to tunnels is often technically infeasible as the structural integrity of the building may be endangered. For headhouses, often very little, if any, extra protection is provided by the installation of a second exit. The limited floor space of headhouses would requir that exits be within close proximity to each other such that any single event could prevent access to both exits.

Similarly, two exits, regardless of location, would be virtually useless in the event of an explosion. A 1983 research project sponsored by NGFA concluded that the flame front of an explosion can travel down a tunnel or gallery at a rate of 250 feet per second.

The tremendous economic impact of the emergency escape provision upon the industry has been completely ignored by three different OSHA economic impact studies. While OSHA's studies state that these provisions have no impact on the industry, the provisions will in fact present very serious economic and compliance problems. The NGFA's written survey found that grain handling facilities average more than .9 tunnels per facility and only 74 percent of the tunnels now have two exits or have windows available for escape.

The economic analysis performed by GEMCI-MRI for NGFA found that the emergency escape provision would cost a minimum of $18 million for the industry to comply. The study determined that more than 5,000 tunnels would be required to add an exit and more than 2,100 headhouses would need to install special escape ladders to meet this provision. Specific costs for escape exits are given in NGFA's submitted economic report "Evaluation of the Proposed OSHA Standard for Grain Handling Facilities", GEMCI-MRI, 1984.

Because emergency egress is already addressed in the general industry standards, because the emergency escape routes are to be addressed by facilities in their emergency action plan, and because Booz-Allen readily states that OSHA is proposing a requirement that is "not as stringent as existing provisions," the NGFA recommends that OSHA delete this entire provision from the standard.

(o) Grain Dryers

The requirement that direct-heat grain dryers be equipped with an automatic device to prevent grain from entering the dryer in the event that the exhaust air reaches excessive temperatures or if the grain discharge becomes clogged is overly restrictive. The requirement will necessitate installation of elaborate and expensive systems on grain dryers to detect when grain is not being discharged from the dryer or an overheated condition is reached. While most grain dryers are equipped with devices to detect and prevent grain flow into the dryer when excessive temperatures are reached, very few are equipped with a device to detect a plugged condition in the grain discharge and subsequently stop grain from feeding into the dryer.

The estimated cost to install an electronic gate which could be activated if either a high temperature condition or blockage of the discharge occurs would be in excess of $2,100. Our economic cost study shows that this provision would cost, as a minimum, in excess of $17 million. This cost could be reduced by more than a factor of 10 with the elimination of the automatic shut-off for blockage of discharge features and retention of the high temperature requirement. The device to detect the discharge plugged condition would only serve to duplicate the detection of excessive temperatures since the temperature device would soon be activated if grain flow through the dryer ceased. The NGFA recommends that OSHA delete the portion of the requirement which stipulates that grain dryers be equipped with a device that will detect a clogged condition in the grain stream exit.

The NGFA supports the grandfathering of existing facilities from the requirement that grain dryers be located outside the facility, as currently proposed by OSHA.

(p) Inside Bucket Elevators

The bucket elevator requirements are among the most costly proposed in the standard. Many of the requirements will present both technical and economic burdens upon the grain industry. NGFA's economic study indicates that OSHA and its consultants have understated by 200 percent the economic impact of the bucket elevator provisions upon the grain handling industry. OSHA has underestimated the number of bucket elevators affected and overestimated the benefits of these proposed provisions.

The economic analysis performed by GEMCI-MRI for NGFA clearly shows that the bucket elevator provisions will have a major cost impact upon the industry. The bucket elevator requirements will cost in excess of $95 million, more than twice the OSHA estimated cost. The NGFA data uses actual non-compliance rates determined from an industry-wide written survey to determine cost, while OSHA consultants relied upon guesstimates. Many of these costs are unnecessary and will not provide the safety benefits claimed. Elimination of the provision requiring a belt alignment would reduce the cost by $45 million and elimination of the interlocking portion of the motion detection requirement could eliminate a needless $10 million dollar cost impact. Adoption of NGFA's recommendation to eliminate the partially inside bucket elevator provision would eliminate an additional $13 million cost. Adoption of other suggested changes offered by NGFA would further reduce the cost of the standard and the bucket elevator provisions. NGFA believes the technical and economic data compiled clearly indicate a need for change in the bucket elevator provisions.

Section (p) contains largely design and equipment criteria rather than performance criteria found in other parts of the standard. Many of the requirements contain technologies that are currently unrealistic and have not been accepted as proven because of the many operational and maintenance problems encountered when these technologies have been used. Some of the past problems can be attributed to developmental problems with devices. Others have not been solved. All of the proposed requirements will require the installation of new devices and modifications to existing bucket elevators. Therefore, OSHA's assertion that mechanical devices and equipment are preferable to reliance on employees to detect operational or safety problems is erroneous. For a fully automatic facility where few people are available, mechanical and monitoring devices may be useful. However, an employee's experience, education and training often may be more effective than the devices.

The bucket elevator provisions will present difficulties for companies to obtain and install new equipment or devices. In some instances it is questionable whether adequate suppliers and approved equipment exist to meet the motion detection, belt alignment or bearing temperature provisions. Time extensions will be needed to allow for the availability, purchase, and installation of devices to make modifications to existing bucket elevators. Effective dates of the bucket elevator provisions should be extended to allow time for compliance. For other provisions, such as grounding, it is doubtful if any safety benefit will result.

The NGFA recommends that the requirement in p(2), grounding, and p(7), alignment detection devices, be deleted because they are not cost-effective, provide no safety benefits and/or are not proven technology. The NGFA recommends that small facilities be exempt because of the impracticality and high cost of compliance of the requirements of p(5) interlocking of feeding conveyors to motion detection devices and p(6) remounting or monitoring of bearings.

The NGFA offers the following comments to each specific provision in section (p).

(p)(1) The NGFA recommends that the word "assure" be deleted from this provision. Employers can train and instruct employees to utilize safe operating procedures by not jogging legs when they become choked. The NGFA recommends that (p)(1) be changed as follows:

> The employer shall train and instruct employees not to jog bucket elevators to free a choked leg.

(p)(2) The NGFA recommends that this grounding requirement be deleted. There is no evidence to indicate that static electricity has caused problems in bucket elevators. The NGFA's research report on electrostatic grounding characteristics of grain facilities (report SMS-82-050) shows that a metal casing bucket elevator is adequately electrostatically grounded by the nature of its construction. Bucket elevators made of wood casing and concrete-encased bucket elevators could not be grounded and would require elaborate ground systems for the internal bucket elevating system. Current electrical requirements contained in Subpart S of 1910 adequately address electrical grounding. There is no reason to believe that this additional grounding for electrostatics is warranted. Therefore, (p)(2) should be deleted.

(p)(3) We believe that there is insufficient evidence to indicate that electrostatics have been a cause of bucket elevator explosions. Therefore, the benefits of this requirement are in doubt. If the requirement is retained, the term "assure" should be deleted. Elevator operators will need to accept manufacturer specifications regarding the surface resistivity of belting materials. Belting already purchased or on order should be grandfathered under this provision and thus the time allowed for compliance be extended to allow at least one year before becoming effective. The NGFA recommends that (p)(3) be changed to state:

> One year after the effective date of this standard, belting and lagging purchased for installation in bucket elevators shall have a surface resistivity not to exceed 300 megohms according to the manufacturers' specification.

(p)(4) The inspection door provision needs to be made more performance oriented. Any access which would allow for inspection of the head or boot section of a bucket elevator, whether it be a door, access panel or other means of visual and maintenance access, should be permitted. Modifications to bucket elevators for inspection and maintenance access can be extensive and costly due to the need for planning, engineering design and construction. When portions of the head section are concrete enclosed, the addition of inspection doors for full viewing of all areas will be extremely costly. In many cases, smaller access ports in the head section allow for visual inspection of the critical items. The NGFA recommends that (p)(4) be revised to allow the use of other means of access to inspect or clean out the bucket elevator and that the effective date be extended until two years after the effective date of the standard.

(p)(5) The NGFA recommends deletion of the interlocking requirements in the motion detection device provision that requires automatic shut down of the feeding conveyor. The automatic shutdown of conveyors by interlocking is not a complete answer since serious problems with grain spillage plugging of grain handling equipment could occur. Automatic conveyor shutdown will provide little added protection and could present serious difficulties by preventing access for closing manual bin gates feeding the conveyor that feeds the bucket elevator. Thus, the interlocking requirement could force almost total automation of the grain handling system in order to ensure that another hazard is not created elsewhere. For example, to prevent grain spills from bins feeding conveyors, automatic bin gates would be needed in the event of belt shutdown. We believe that an alarm is sufficient so that the operator can take measures to shut down feeding conveyors and devices in the proper order. Interlocking can be costly if conveyor drive motors are located substantial distances from the bucket elevator. Elimination of the interlocking provision could reduce the cost of this provision by nearly $10 million.

(p)(6) Relocation of bucket elevator bearings to be externally mounted can be extremely complex, requiring engineering redesign and costly construction changes to the entire drive and tail pulley mechanisms. Bearing mounting externally is a consideration for new bucket elevators but is very costly on many existing bucket elevators. This makes it extremely important that OSHA clarify which bearing mountings would be considered partially inside bearings. For example, is a flange bearing considered an external bearing? The NGFA believes that flange bearings should not be required to be relocated, remounted and equipped with thermal detection devices. A good inspection and preventive maintenance program can adequately prevent overheated flange mounted bearings. The NGFA recommends that OSHA extend the effective date until two years after the effective date of the standard to give adequate time to make needed changes and to purchase equipment; and that small facilities be exempt from this requirement.

(p)(7) There is a great deal of skepticism by many in the industry as to the reliability of currently available belt alignment devices. This technology needs additional development before the industry should be required to rely upon these devices to detect improper alignment. There have been a number of devices tested in elevator operations to maintain alignment or to detect misalignment. Industry members report that the devices often cannot be maintained and failed to provide the needed protection. The NGFA believes it is premature to require this technology.

CEMCI-MRI economic analysis shows that the belt alignment cost will exceed $45 million out of a total initial equipment cost for all bucket elevator requirements of nearly $83 million. Further, the analysis indicates that more than 96 percent of all bucket elevators inside grain elevators would be affected by this requirement. In some cases new bucket elevators may be able to be designed to utilize belt alignment detection devices or other methods to prevent belts from tracking outside safe limits. However, it would be important to grandfather all existing bucket elevators from this requirement.

(p)(8)(i) The NGFA believes that options to requirements in the standards are an important means of providing flexibility in the standard and help them to be more performance oriented. The NGFA's fire and explosion research has shown explosion suppression installed in the head and boot section of bucket elevators to be effective in stopping an explosion and its damaging effects, "Explosion Venting and Suppression of Bucket Elevators," NGFA, 1981. This option should be retained.

(p)(8)(ii) The NGFA is currently sponsoring research to examine dust control in bucket elevators and effective and reliable methods to measure dust inside of bucket elevators.

(q) Partially Inside Bucket Elevators

The NGFA recommends that these provisions be deleted as indicated in our comments on the definitions of bucket elevators in (c)(6) and (c)(9). This provision would require motion switches on what our industry considers to be an outside bucket elevator. The hazards of these legs are avoided by their location and, therefore, they should not be required to have motion switches. This provision will add a needless cost of an additional $13 million to the standard and will not make a significant contribution to safety, GEMCI-MRI, 1984.

Appendixes

Appendix A should be omitted. We disagree with some of the "non-mandatory" advice it contains; it improperly expands the scope of the standard; and it will create confusion from the standpoint of compliance and enforcement.

Appendix B also should be omitted. These are not "consensus standards" of the grain industry. They were developed by bodies in which members of our industry, if they participated at all, were in the minority and had no influence on the advisory pronouncements which ANSI/NFPA adopted. Administrative law judges of the Occupational Safety and Health Review Commission have declined to find these pronouncements to be "consensus standards."

Conclusion

The NGFA believes the evidence shows that there are much more effective alternatives to OSHA's proposed grain handling standard. The industry already is actively pursuing those areas that promise to contribute to safety, without the unreasonable costs and technical infeasibility contained in many provisions of OSHA's proposed standards.

As demonstrated in these comments and NGFA's testimony, OSHA has failed to adequately recognize the importance of ongoing safety education and training, or to recognize the market incentives that exist among all grain elevator owners and operators to ensure safety in their facilities. The NGFA believes that the progress made in the last several years clearly indicates a greater safety awareness and a positive response by employers, employees and the trade associations that serve the industry to voluntarily address the safety issues they confront, and to seek and implement solutions.

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OMB Control of Agency Rulemaking:

The Case for Broadened Record Review

Steven T. Kargman
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President Reagan's adoption of Executive Orders 12,291[1] and 12,498[2] ("E.O. 12,291" and "E.O. 12.498," respectively) has given the Office of Management and Budget ("OMB") a central role in agency decision-making.[3] Since OMB involvement is not typically reflected in the administrative record submitted for judicial review,[4] courts will be frustrated in their efforts to conduct meaningful review of agency rulemakings with significant OMB involvement. OMB involvement, therefore, can unlawfully undermine important public policy objectives in administrative law, including reasoned decisionmaking by agencies and access to the rulemaking process by all parties, and allows OMB unlawfully to frustrate the intent of Congress contained in agencies' statutes.

Consequently, the courts should broaden the administrative record subject to judicial review where it can be established by the presence of "danger signals" that OMB significantly altered the course of a rulemaking. Reviewing courts should have access, through discovery, to all documents relating to communications between OMB and the agency. This approach will allow careful scrutiny by the courts of what went on in OMB-influenced agency rulemakings to ensure reasoned, expert decisionmaking with full public participation.

I. OMB Intervention in Agency Rulemaking and Judicial Review: Nature of the Problem

E.O. 12,291 permits OMB to have wide-ranging influence on agency rulemakings,[5] largely by giving OMB the authority for pre-publication clearance of proposed agency rules.[6] The stated purpose of E.O. 12,291 is to implement cost-benefit analysis and other principles.[7] In practice, since the adoption of E.O. 12,291, OMB has exercised its authority broadly in several major rulemakings concerning the use of asbestos,[8] the operation of underground hazardous waste tanks,[9] the notification of workers regarding hazards at the workplace,[10] the level of allowable air pollutants,[11] the distribution of infant formula,[12] and the maintenance of water quality.[13] These examples are not isolated instances of OMB's interventions into the rulemaking process under E.O. 12,291.[14]

Despite this broad authority under E.O. 12,291, OMB in practice has made itself unaccountable for its involvement in the administrative process. This unaccountability stems from the fact that OMB involvement is largely kept secret and not revealed in the agency's rulemaking record.[15] During the course of a rulemaking, OMB officials will engage in numerous telephone calls and meetings with agency officials, and yet public disclosure of these communications may be virtually non-existent. In addition, OMB staff may receive secret communications from private parties regarding a rulemaking which also are not revealed publicly.

The integrity of the rulemaking process is threatened by these OMB interventions. One Congressional report has highlighted the dangers of OMB interventions into Environmental Protection Agency ("EPA") rulemakings: arbitrary delays in the rulemaking process; the displacement of the agency's technical expertise; unrecorded meetings between OMB and EPA as well as between OMB and private parties; the use of OMB as a conduit for industry views; and oral rather than written communictions from OMB to EPA which are thus not reflected in the administrative record.[16]

In addition, OMB involvement violates

congressional intent in three ways.[17] First, it effectively displaces the authority of those agency officials who Congress has designated as administrative decisionmakers. Second, it prevents meaningful public participation in, and effective judicial review of, the rulemaking process as prescribed by the Administrative Procedure Act ("APA") and other statutes. Finally, it causes the application of statutorily impermissible substantive criteria (i.e., cost-benefit analysis).

With respect to judicial review specifically, OMB involvement in agency rulemaking causes unique problems because this involvement is undocumented in the administrative record. OMB involvement in rulemakings generates two possible records: one reflecting what happened during the agency's public rulemaking proceedings and the other concerning what happened between the agency and OMB.[18] In the past, only the former record existed which reflected the agency's findings as well as public participation in the rulemaking.[19] This package was submitted by the agency for judicial review when agency action was challenged in the courts.[20] Under traditional judicial review doctrine, the scope of review was limited to a "review on the record": that is, courts generally do not undertake de novo review, but rather confine their review to the administrative record on which the decision was made.[21]

If review on the record were applied where there is active OMB involvement in rulemaking, the courts would be presented with a distorted picture of how the agency reached its final decision.[22] The courts would see only the first record reflecting what happened during the agency's public proceedings. But the courts would not see any documents reflecting what happened betweeen the agency and OMB since these communications are not included in the administrative record. In other words, by limiting themselves to review on the record, courts would focus on public proceedings which may be irrelevant since the crucial dynamic in E.O. 12,291 rulemakings concerns the non-public communications between OMB and the agency.

Courts need to understand the anatomy of OMB-influenced rulemakings as involving various sets of interactions between the agency and OMB. The first set of interactions relates to the flow of communications from the agency to OMB surrounding a proposed rule. The second set of interactions covers OMB communications to the agency. The third set of interactions concerns OMB contacts with outside parties during rule review, with OMB possibly serving as a conduit for these parties in dealing with the agency. Each of these three sets of interactions has important, distinct consequences for judicial review and the appropriate scope of the record, and it is crucial that judicial review reach these three sets of interactions.

Agency communications to OMB can reveal how the agency would have acted in a given rulemaking if the agency alone (as distinct from OMB) were promulgating the rule.[23] The reasons courts should focus on these communications relates to the traditional judicial concern with "danger signals" in agency rulemakings which courts define as abrupt shifts in agency policy.[24] These danger signals may indicate that the agency is acting in an arbitrary manner. Where the courts find danger signals, they take a closer look at agency rulemaking and require the agency to supply a reasoned analysis indicating why it is reversing previous policies and standards.[25]

The danger signals analysis has been applied in many deregulation cases, with the courts invalidating rescissions and suspensions of rules as "arbitrary and capricious."[26] These deregulation cases provide a useful analogy for agency rule-makings with significant OMB involvement. Given this OMB involvement, "deregulation" may effectively take place in one step.[27] Unlike deregulation that targets rules which have been in existence for years, OMB-influenced deregulation targets rules within the period of the rulemaking process itself.

In addition to focusing on this interaction beween the agency and OMB to facilitate a danger signals analysis, courts should attempt to isolate this interaction because at this starting point, they would be most willing to defer to the tentative administrative decision. At this stage of the E.O. 12,291 rulemaking process, courts could rely on presumptions of agency expertise,[28] the procedural regularity of the administrative process,[29] and full public discussion and participation in the rulemaking.[30]

OMB communications to the agency represent the crux of the E.O. 12,291 process since these communications relate to OMB review of proposed rulemakings. While virtually none of these communications will be found in the administrative record, some of these communications may be formal and contained in memoranda and other written documents.[31] The majority of these communications, however, may be informal and conducted over the telephone on a regular, day-to-day basis, although documentation of these communications may exist as well.[32]

The courts will want to focus on this interaction for several reasons. First, this interaction may evidence the factors that OMB brought to bear on the rule ultimately adopted by the agency. The courts will want to compare these factors with the statutorily-mandated factors to determine whether the ultimate agency rule can survive the "arbitrary and capricious" standard of review.[33] Second, since OMB wields substantial political clout within the Executive Branch, it may attempt to exert raw influence that is plainly unlawful[34] and similar in some respects to that which has been prohibited in the congressional-agency context.[35] Finally, only by knowing the OMB position on a rulemaking can courts usefully apply a danger signals analysis.[36]

Private party communications to OMB may be viewed as *ex parte* contacts between these parties and OMB.[37] When OMB acts as a conduit to the agency for these *ex parte* contacts, the ultimate rule issued by the agency may therefore be influenced by these contacts. Just as some courts have required docketing of *ex parte* contacts in informal rulemakings,[38] commentators have proposed that courts should do the same where the rulemaking is conducted pursuant to E.O. 12,291.[39]

II. *Proper Judicial Characterization of OMB Involvement*

The way in which courts characterize OMB involvement in agency decisionmaking has major implications for the appropriate scope of judicial review. There are essentially three models for dealing with this problem of characterization: OMB as presidential agent, OMB as Executive Branch party to an agency rulemaking, or OMB as decisionmaking authority. For the reasons discussed below, the most accurate way to characterize OMB involvement is a hybrid of Executive Branch party/decisionmaker. Under this hybrid model, a reviewing court could reach the three sets of interactions between the agency and OMB discussed in the preceding section. Under the presidential agent model, by contrast, these communications would largely be off-limits to a reviewing court.

A. OMB as Presidential Agent

The model of OMB as presidential agent is the one favored by OMB and the Reagan Administration.[40] This model allows OMB to intervene in the E.O. 12,291 rulemaking process just as OMB goes about its other business.[41] According to this view, OMB is merely playing a supervisory role vis-à-vis the agency.[42]

The Reagan Department of Justice has taken the position that communications between OMB and the agency are covered by the so-called deliberative process exception.[43] The Department of Justice grounds this exception to disclosure in the President's constitutional power to "take care that the laws be faithfully executed,"[44] the privilege for certain deliberative communications within the Executive Branch,[45] and the prohibition against probing the mind of the decision-maker.[46] The Department of Justice also highlights the fact that the same deliberative process exception is incorporated in the Freedom of Information Act.[47] Another source of privilege which would attach to OMB under this presidential agent model results from the view that while there are many agencies in the Executive Branch, each is working for and reporting to the same president;[48] some commentators have referred thus to a unitary Executive Branch.[49]

There are several problems with this model of OMB as presidential agent, including the legal analysis which underpins it. In the first place, it is misleading to compare OMB involvement in rulemakings with other OMB activities: the uniqueness of the rulemaking process is recognized by the APA,[50] and any analogy, for example, to OMB involvement in the budget process is flawed.[51] Second, it is gross understatement to label OMB's involvement "supervisory" when the public record is replete with examples of OMB going far beyond a mere supervisory role.[52] Third, it is not readily apparent that the deliberative process exception extends to OMB involvement in agency rulemakings under E.O. 12,291.[53] Finally, the unitary view of the Executive Branch may not be applicable to E.O. 12,291 rulemakings since there is no direct presidential involvement.[54]

B. OMB as Party to Rulemaking

Under the model of OMB as Executive Branch party to an agency rulemaking, OMB would participate in an agency's rulemaking just as any other Executive Branch body would participate -- i.e., as a party to the rulemaking.[55] In an E.O. 12,291 rulemaking, it is possible that several Executive Branch departments and agencies will wish to express their views and will do so by submitting a statement for inclusion in the administrative record for that rulemaking.[56] By contrast, where there is OMB involvement in the agency rulemaking, this involvement will not be reflected in the administrative record and will therefore be unavailable for judicial review.[57]

This party model attempts to redress the asymmetry in the way OMB involvement is treated compared to involvement by other Executive Branch departments and agencies.

The model treats OMB as a party to the agency rulemaking whose views must be submitted in writing for the administrative record or presented as testimony given at public hearings. The main deficiency with this model is that in treating OMB like any other Executive Branch party, it ignores the unique leverage that OMB has over the rulemaking process under E.O. 12,291.[58]

C. OMB as Decisionmaking Authority

The model of OMB as decisionmaking authority stresses the displacement of discretionary agency authority, as noted by commentators[59] and recent litigants.[60] The model draws attention to the fact that while it is formally the agency administrator who must sign any rule submitted to the _Federal Register_, it is in reality OMB which is responsible for the substance of that ultimate rule under E.O. 12,291.[61] This same displacement of discretionary authority can also be observed earlier in the rulemaking process where OMB, for example, bottles up a proposed rule in its review process; unreasonable delay by OMB can in effect transfer the decisionmaking authority from the agency to OMB.[62]

If OMB is considered the decisionmaker, then certain implications for judicial review follow from this conclusion. On the one hand, OMB might be protected by the general prohibition against probing the mind of the decisionmaker in the absence of bad faith.[63] On the other hand, OMB, like any other agency undertaking a rulemaking, would be bound to provide a statement of reasons for its support of a particular rule.[64]

The central problem with this model is that it presumes _ex ante_ an extensive role for OMB as decisionmaker, an issue which the proposed expanded judicial review would in part be seeking to determine. Nevertheless, an attractive feature of the model is its prescriptive element -- that is, that OMB involvement in agency rulemaking should be made transparent.

D. _Hybrid Model_: _OMB as Party-Plus_

This Note advocates and adopts a hybrid model, OMB as party-plus, combining the second and third models above, because this hybrid model represents the most accurate way to characterize OMB involvement. OMB is more than merely a supervisor for agencies in E.O. 12,291 rulemakings, has greater influence over these rulemakings than other Executive Branch parties, and yet it cannot be presumed *ex ante* that OMB is the decisionmaker. Therefore, on the continuum of OMB influence over agency rulemaking, OMB has the status of a "party-plus."

If the courts embrace this hybrid characterization, they have a justification for demanding at a minimum that OMB, like any other party, place its comments to the agency in the public record. In addition, since the characterization implies that OMB is in fact a party-*plus* in E.O. 12,291 rulemakings, the courts have grounds for scrutinizing more closely OMB's participation in the rulemaking. Just as courts often take a "hard look" at agency rulemakings,[65] under the party-plus characterization, they would have a basis for approaching the same degree of scrutiny for OMB involvement in E.O. 12,291 rulemakings.[66] Specifically, the courts could apply the hard look to OMB-agency communications which are not routinely contained in the administrative record.

III. *Beyond the Agency Record: Broadened Review of OMB-Agency Interactions*

A. *The Current Record Review and Exceptions*

Two major Supreme Court cases, Citizens to Preserve Overton Park v. Volpe[67] and Camp v. Pitts,[68] reaffirmed the traditional narrow definition of what constitutes the judicially-reviewable agency record. In these two cases, the Court stated that judicial review should be based on the existing administrative record, not a new record compiled initially in the reviewing court.[69] At the same time that both Overton Park and Camp circumscribed the scope of judicial review, they simultaneously developed a limited exception to strict review on the record. The Court indicated that where the "bare record" did not adequately reveal the factors which influenced the agency administrator, it would be appropriate for the reviewing court to require the administrator to give testimony explaining the decision or to submit affidavits.[70]

Despite the Supreme Court's general prohibition against extra-record evidence, the lower courts have developed many exceptions to the Overton Park-Camp formula by allowing evidence from outside the administrative record as defined by the agency under a range of circumstances.[71] These exceptions form the basis for broadened record review in the E.O. 12,291 rulemaking context.

One important exception involves cases where evidence considered by the agency has been left out of the formal record.[72] The concern in these cases is that the agency can "skew the 'record' for review in its favor by excluding from that 'record' information in its files which has great pertinence to the proceeding in question."[73] This concern about agencies editing the record for review could arise in E.O. 12,291 rulemakings where an agency excludes information in its files related to its communications with OMB which might reveal the agency's original position in a rulemaking. If the agency were to skew the record in its favor in this way, it could thereby frustrate efforts by petitioner to prove a sharp reversal in agency action as part of a claim of "arbitrary and capricious" decisionmaking.[74]

Another major exception to review on the record reaches agency action that is not adequately explained.[75] Where there is inadequate explanation, the lower courts, building on the Supreme Court's instructions for remand in Overton Park, have accepted new testimony or remanded the case to the agency for further explanation.[76] The idea behind this exception is that where "significant questions were seriously contested" before the agency, the court must have an explanation that enables it to understand "the connection between the record before it and the choice it (the agency) makes."[77]

In an E.O. 12,291 rulemaking, inadequate explanation may be a problem where petitioner can establish danger signals. If there are danger signals reflecting the fact that the agency has changed course dramatically as a result of OMB influence, the connection between the agency record and the agency choice will be unclear. Since the OMB involvement is not part of the public record, the court may have no indication as to why the agency chose a final course of action which differed so sharply from its intended course of action.

B. A Broadened Record to Enable Judicial "Hard Look" at Rulemakings with Significant OMB Involvement

While broadening the record may be the exception to the rule in most situations, it is a virtual necessity in E.O. 12,291 rulemakings in order to preserve meaningful judicial review. For judicial review to remain effective at policing the exercise of agency discretion, courts must pierce the veil of agency rulemaking where there is OMB involvement. Whereas courts typically review the end result of agency rulemaking and the record support for the rule in accordance with the Morgan doctrine, courts must instead focus on the process of E.O. 12,291 rulemakings and the various sets of interaction between the agency and OMB.[78] This approach of piercing the veil is a prerequisite for compiling a complete record for judicial review.

Such an approach is consistent with the

move by the courts in the last decade from a posture of deference to agency rulemaking towards the "hard look" doctrine.[79] The hard look approach was endorsed most recently by the Supreme Court in Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.[80] The hard look doctrine, as it now stands,[81] requires substantively that an agency's findings of fact have a basis in the record[82] and that an agency's policy choice be reasonable.[83] Where agency action does not survive hard look scrutiny, the judicial response has been invalidation of the rule for failure to pass the "arbitrary and capricious" test.[84]

In E.O. 12,291 rulemakings, courts will

have difficulty enforcing the hard look doctrine where the administrative record does not reflect the crucial OMB involvement.[85] Before courts can attempt to apply the hard look to E.O. 12,291 rulemakings, they must ensure that the administrative record adequately reflects communications between the agency and OMB.[86] Otherwise, the courts will be taking a hard look at a record which reveals little about what went into the agency decision. Only when the courts are satisfied that they are reviewing the "whole record," including the various interactions between the agency and OMB, will they be able to undertake the hard look analysis.

To trigger this broader record review, petitioner should have to establish the presence of danger signals.[87] In other words, petitioner should have to establish preliminarily that there is strong reason to believe that the agency substantially altered its position as a result of OMB influence. Since OMB can intervene in an agency rulemaking at several stages (from the birth of the idea of a regulation to the issuance of final rule itself),[88] the danger signals analysis must be available to petitioner at whatever stage it is appropriate in the particular rulemaking.[89]

If a rulemaking has reached the final stages, it may be possible for petitioner to satisfy the threshold requirement by bringing to the reviewing court's attention the discrepancy between an advance notice of proposed rulemaking and the final rule, both published in the _Federal Register_.[90] The more difficult cases, also the more common, are where OMB intervenes early in a rulemaking and there may not even be an advance notice of a proposed rulemaking in the _Federal Register_, much less a notice of the final rule itself;[91] this is particularly true where OMB unreasonably delays its review of a proposed rule. In these cases, the courts need to be sensitive to less formal danger signals, such as public statements by agency officials suggesting changes in the agency position, agency press office statements, and so on.[92]

Where the court finds the presence of danger signals, it can take the appropriate steps to broaden the administrative record. The court can handle this process of broadening record review in roughly the same what that it handles discovery requests.[93] Practical problems will inevitably arise if the courts of appeals end up supervising discovery. Nevertheless, in certain cases, where there are significant disputes between the parties, it may be necessary to appoint a master[94] or designate a district court judge to supervise discovery.

C. The Primary Goals of Reasoned Decisionmaking and Full Public Participation

The proposal for broadened record

review builds on judicial precedents but ultimately hinges on two overriding public policy goals in administrative law: reasoned decisionmaking and access by all parties to the rulemaking process. In view of the problems and dangers posed by E.O. 12,291 for the process of judicial review, these two goals make broadened record review a public policy imperative.

1. Reasoned Decisionmaking

Reasoned decisionmaking is a major public policy goal because the administrative process exists largely as a means of generating prudent public policy choices for the government. The expertise of agencies is considered a major resource of the government for dealing with complex decisions and achieving "comprehensive rationality"; the insistence by courts on reasoned decisionmaking ensures that this expertise will be exercised.[45]

The requirement of reasoned decision-making traces its roots to the drafting of the APA itself[46] where the emphasis was on giving agencies flexibility and autonomy in formulating policy.[47] In the current era of administrative law, the notion of reasoned decisionmaking can best be understood as the mirror image of "arbitrary and capricious" decisionmaking. In the State Farm decision, the Supreme Court defined the "arbitrary and capricious" standard to include agency consideration of factors prohibited by Congress, failure to examine an important aspect of a problem, an explanation unsupported by the record, or an implausible outcome.[98]

In deregulation cases, the courts have been particularly insistent upon the requirement of reasoned decisionmaking. The rationale for this approach is that a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."[99] Therefore, the decision to deregulate runs counter to the presumption against changes in current agency policy that are not supported by the record.[100]

The courts should extend the deregulation analysis to E.O. 12,291 rulemakings. In the traditional deregulation context, the "settled course of behavior" refers to the fact that an agency has adopted a regulation which it repeals at a later date. In E.O. 12,291 rulemakings, the "settled course of behavior" would refer to the agency's intended course of action before OMB influence is brought to bear. It is possible in an E.O. 12,291 rulemaking that even though the agency has not reached the stage of issuing a final rule, its intended course of action may have existed for several years.[101]

Given the original APA concern with preserving agency autonomy to ensure reasoned decisionmaking, the E.O. 12,291 decision to deregulate at the behest of OMB must be subjected to the same degree of judicial scrutiny as the more traditional deregulation cases. The involvement of OMB introduces a foreign element, "extra-agency" control, to agency rulemaking which was rejected by the drafters of the APA when such a proposal was made for a central ccordinating agency.[102]

2. Public Participation

Public participation in the administrative process serves important goals. The first is that it brings a broader range of views and experience to a problem, thus enabling an agency to formulate a solution based on better information. The second is that public participation ensures that the agency engages in a dialogue with the public; this gives the administrative process a certain legitimacy in the eyes of those who will be affected by agency regulations.

Another central thread behind the adoption of the APA was the need for public participation in the rulemaking process. A report for the Attorney General prior to the adoption of the APA highlighted this theme when it indicated that agency procedures "should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses."[103] The APA mechanism for achieving these goals is the so-called notice-and-comment rulemaking which provides the public with the opportunity to respond to agency proposals.[104]

In recent years, the courts and Congress have ushered in an interest representation model of rulemaking in which public participation is the linchpin.[105] This "reformation of administrative law," where the agency is viewed as a quasi-legislature, has manifested itself in the expansion of standing, the expansion of participation rights before the agency, and the requirement of adequate consideration of all participating interests in decisions on agency policy.[106] Certain "hybrid rulemaking" statutes have enhanced public participation by granting interested persons the right to present their positions both orally and through documentary submissions, and, where there are disputed issues of material fact, to present rebuttal testimony and to conduct cross-examination of witnesses.[107]

E.O. 12,291 severely undercuts this interest representation model of agency decisionmaking and subverts public participation. As one recent congressional report stated: "While Congress envisioned equal access to the rulemaking process by all affected parties, OMB has gained a preferred and early vantage point to assert its view."[108] Furthermore, if the communications between the agency and OMB are decisive to the agency's final course of action, the agency's conclusions as quasi-legislature are virtually irrelevant, and public participation plays no role except perhaps for a window-dressing function.

Therefore, broadened record review is necessary to preserve public participation by maintaining the vitality of this interest representation model. This approach will achieve that goal by ensuring that the agency's conclusions as quasi-legislature, as opposed to mere adjunct to OMB, are included in the public rulemaking record. Under this approach, then, public participation rights, which have assumed such significance in the last decade, can be safeguarded from the intrusions of OMB.

In addition, in the last decade, the argument for public participation has taken on a due process dimension. The courts have developed an *ex parte* contacts doctrine as a means of ensuring the due process rights of parties affected by agency action.[109] The courts have restricted *ex parte* contacts in order to ensure fairness to interested parties with respect to access to the decisionmaker,[110] to protect the opportunity of outside parties to comment on issues before the agency,[111] and to preserve the meaningfulness of judicial review.[112]

The threat to these due process concerns surrounding *ex parte* contacts is substantial in E.O. 12,291 rulemakings. OMB's decisionmaking process is governed neither by a statute prescribing rulemaking procedures nor by the informal rulemaking requirements of the APA.[113] Moreover, *ex parte* contacts are no longer an *ad hoc* matter but rather an institutional feature of E.O. 12,291 rulemakings.[114] *Ex parte* contacts will arise in communications between the agency and OMB as well as in communications between OMB and outside parties. In view of this potential for *ex parte* contacts under E.O. 12,291, the proposal for broadened record review to ensure public participation is an important means of policing these *ex parte* contacts and therefore has important due process underpinnings.

Conclusion

The adoption of E.O. 12,291 has significantly altered the administrative process. Courts must develop an appropriate response for dealing with the unique problems posed by OMB involvement in agency decisionmaking. The proposal for broadened record review has its legal basis in the proper characterization of OMB involvement in E.O. 12,291 rulemakings and the extension of the hard look doctrine. This proposal is buttressed by two overriding public policy goals, reasoned decisionmaking and access by all parties to the rulemaking process.

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Kargman Footnotes

[1] 3 C.F.R. { 127 (1982), *reprinted in* 5 U.S.C. { 601 app. at 431-34 (1982) [hereinafter cited as E.O. 12,291]. E.O. 12,291 establishes a system of pre-clearance review of proposed agency rules conducted by the Office of Management and Budget ("OMB") in accordance with certain economic principles, including cost-benefit analysis. For a fuller discussion of the mechanics of E.O. 12,291, *see infra* text accompanying notes 5-7.

E.O. 12,291 has sparked a considerable debate regarding its constitutionality. Several commentators have argued that E.O. 12,291 violates separation of powers. *See, e.g.*, M. ROSENBERG, PRESIDENTIAL CONTROL OF

AGENCY RULEMAKING, 97th Cong., 1st Sess. 42 (Comm. Print 1981) [hereinafter cited as *Rosenberg Report*]; Olson, *The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 **Va. J. Nat. Resources** L. 1, 25 (1984).

Other commentators, however, have defended the constitutionality of E.O. 12,291 as a proper exercise of presidential coordination of Executive Branch action. *See*, *e.g.*, Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 **Ariz. L. Rev.** 1235 (1981); Department of Justice, Office of Legal Counsel, Memorandum of February 17, 1981, *reprinted in*, *Role of OMB in Regulation: Hearing before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess., 486-498 (1981) [hereinafter cited as *DOJ Memorandum* and *Hearings on Role of OMB in Regulation*, respectively]; Strauss and Sunstein, *Regulatory Reform: The Presidential Role*, Report of the Committee on Separation of Powers, ABA Administrative Law Section (1987).

The constitutional debate, which has been well-rehearsed by commentators, presents difficult questions that will probably remain unresolved by the courts for some time. In the meantime, OMB review will continue to be an institutional feature of the administrative process. Thus, the question for the foreseeable future is how courts should deal with the unique problems posed by OMB involvement in agency decisionmaking.

There has been some commentary regarding the implications of E.O. 12,291 for the process of judicial review focusing on an agency's compliance with its statutory mandate. See, e.g., [illegible], Judicial Control of Regulatory Action Based on Cost-Benefit Analysis, [illegible] L. Rev. [illegible] ([illegible]). This Note does not focus on the [illegible] constitutional issues surrounding E.O. 12,291 but rather deals with an issue which has not been addressed systematically in the earlier commentary on judicial review: how to ensure effective judicial review of agency action under E.O. 12,291 where the administrative record subject to judicial review does not adequately reflect communications between the agency and OMB.

[2] 46 Fed. Reg. 1036 (1985). E.O. 12,498 requires that heads of executive agencies subject to the Order "shall ensure that all regulatory actions are consistent with the goals of the agency and of the Administration." _Id_. at § 1(b). E.O. 12,498 thus involves OMB in the rulemaking process at an earlier stage than under E.O. 12,291, since it permits OMB to block regulatory actions contrary to administration policies before they even are

initiated by the agencies. This Note does not focus on E.O. 12,498 for the simple reason that there is much less experience under this Order than under E.O. 12,291. Nevertheless, the analysis herein can logically be extended from the E.O. 12,291 context to the E.O. 12,498 context.

[3] Rosenberg argues that E.O. 12,291 "establishes for the first time a centralized mechanism for presidential management of agency rulemaking activities... ." Rosenberg Report, supra note 1, at 6.

[4] See, e.g., **Staff of House Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, 99th Cong., 1st Sess.,**

EPA's Asbestos Regulations: Report on a Case Study on OMB Interference in Agency Rulemaking 103 (Comm. Print 1985) (reporting extenstive pattern of undocketed communications between industry representatives and OMB as well as between OMB and Environmental Protection Agency (EPA) in asbestos rulemaking) [hereinafter cited as *Asbestos Report*]; *see also* **Staff of House Comm. on Energy and Commerce, Subcomm. on Oversight and Investigations, 98th Cong., 2d Sess., Investigation of the EPA: Report on the President's Claim of Executive Privilege over EPA Documents, Abuses in the Superfund Program, and Other Matters** 282-94 (Comm. Print 1984) [hereinafter cited as *Investigation of EPA*].

[5] Under E.O. 12,291, if a proposed rule is considered "major", *see* E.O. 12,291 (1(b), then the agency must submit the proposed rule, together with a preliminary Regulatory Impact Analysis, to OMB at least 60 days prior to the publication of the notice of proposed rulemaking in the Federal Register. *Id*. at (3(c)(2). Should OMB determine that this regulatory analysis is deficient, it may order a delay in the publication of the notice of proposed rulemaking or of the preliminary Regulatory Impact Analysis until it has submitted its comments and the agency has responded. *Id*. at ((3(f)(1) & (2). E.O. 12,291 does not impose any time limits on OMB to complete its review. *Id*. at (3(e)(2).

[6] E.O. 12,291 also applies to existing rules. *See id.* at < 6(a)(1). The focus of this analysis, however, is on proposed rules because it is review of new rules influenced by OMB which presents novel questions for judicial review.

[7] Regulations reviewed by OMB pursuant to E.O. 12,291 must be based on adequate information; the benefits to society must outweigh the potential costs to society; the regulatory alternative involving the least net cost to society shall be chosen; among other objectives. *See id.* at < 2.

[8] *See EPA's Asbestos Regulation, Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on*

Energy and Commerce, 99th Cong., 1st Sess. (1985) (OMB forced EPA to withdraw proposed rules concerning banning and phasedown of asbestos use) [hereinafter cited as Hearings on Asbestos]; Asbestos Report, supra note 4; Complaint in Service Employees International Union v. Thomas, Civil Action No. 84-2790 (D.D.C. filed September 11, 1984).

[9] See Complaint in Environmental Defense Fund v. Thomas, Civil Action No. 85-1747 (D.D.C. filed May 30, 1985) (alleging OMB delayed by three months publication of EPA notice of proposed rulemaking for final permitting standards for underground hazardous waste tanks).

[10] See Office of Management and Budget Control of OSHA Rulemaking, Hearing Before

the Subcomm. on Manpower and Housing of the House Comm. on Government Operations, 97th Cong., 2d Sess. (1982) (OMB forced Occupational Safety and Health Administration (OSHA) to delay and weaken proposed hazard communication rule on basis of cost/benefit criteria which were precluded from agency consideration by statute).

[11] *See EPA: Investigation of Superfund and Agency Abuses (Part 3) Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 81 (1983) (OMB forced EPA to subject health-based standards to cost-benefit considerations which Congress determined should not apply) [hereinafter

cited as Hearings on Superfund].

[12] See Infant Formula: The Present Danger, Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 97th Cong., 2d Sess. (1982) (OMB delayed implementation in promulgation of Food and Drug Administration regulations, thereby allowing substantial amount of defective infant formula to enter market).

[13] See Hearings on Superfund, supra note 11, at 5-8; Investigation of EPA, supra note 4, at 285 (OMB forced EPA to eliminate proposed rule dealing with degradation of water quality under Clean Water Act).

[14] See Investigation of EPA, supra note

4, at 282-94, for a catalogue of examples relating, *inter alia*, to EPA's high-level radioactive waste disposal rules; new source performance standards for new or modified stationary air pollution sources; and national ambient air quality standards for particulate matter.

[15] *See, e.g.*, *Asbestos Report*, *supra* note 4, at 100-108 (arguing that Congress' intention to provide for meaningful public participation in EPA rulemakings has been nullified by OMB's secret, off-the-record communications with agency and private parties).

[16] *See Investigation of EPA*, *supra* note 4, at 293.

[17] *See Asbestos Report*, *supra* note 4, at

119.

[18] See, e.g., Brief of Representative John Dingell, et al., as Amici Curiae in Support of Petitioners, Public Citizen Health Research Group v. Rowland, Civil Action Nos. 82-1252, 84-1392, and 85-1014 (D.C. Cir. brief filed March 4, 1984) 25 (shifting locus of decisionmaking from agency that keeps record to which public can respond and courts can review to agency which does not (i.e., OMB), OMB has effectively undermined Congress' intentions regarding nature of rulemaking process).

[19] See Administrative Procedure Act (APA), 5 U.S.C. (553 (1982) (notice-and-comment provisions for informal rulemaking).

[20] The APA simply states that review

shall be limited to "the whole record." *See* 5 U.S.C. § 706 (1982).

[21] *See, e.g.*, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (review is to be based on full administrative record that was before Secretary at time he made decision); *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also* Stark & Wald, *Setting No Records: The Failed Attempt to Limit the Record in Review of Administrative Action*, 36 **Ad. L. Rev.** 333 (1984); McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 **Duke L.J.** 333, 338 (1982).

[22] See, e.g., Asbestos Report, supra note 4, at 108 (arguing that neither Congress nor courts should continue to treat agency's administrative record as if it were real basis for rulemaking decisions when it has been subject to OMB review).

[23] See, e.g., Petitioners' Brief in Public Citizen, supra note 18. The Public Citizen case involves the deletion of a short-term exposure limit ("STEL") from a health standard established by OSHA for the substance ethylene oxide (EtO). Petitioners challenged this deletion of a STEL by OSHA and alleged that the deletion had been prompted unlawfully by the influence of OMB. Petitioners argued that OSHA had originally favored a STEL, and

following months of informal notice-and-comment rulemaking, had transmitted to OMB an EtO standard that included a STEL. In short, petitioners alleged that OSHA would have adopted a STEL but for OMB intervention.

[24] *See, e.g.*, *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851-52 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 932 (1971) (judicial vigilance demanded where agency policies are in flux); *Baton Rouge Marine Contractors* v. *Federal Maritime Comm'n*, 655 F.2d 1210, 1215 (D.C. Cir. 1981) (close scrutiny appropriate in light of agency's departure from previously stated position); *see also* Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 517-20 (1985) (applying "danger signals"

analysis to deregulation cases).

[25] See, Greater Boston Television Corp., 444 F.2d at 852 (agency may not gloss over or swerve from prior precedent without discussion).

[26] The "arbitrary and capricious" standard is one standard of review of agency action pursuant to 5 U.S.C ⟨ 706(2) (1982). For an application of this standard in deregulation cases, see, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983) (NHTSA's rescission of passive restraint requirement for automobiles was arbitrary and capricious); Center for Science in the Public Interest v.

Department of the Treasury, 573 F.Supp. 1168, 1175-79 (D.D.C. 1983), *vacated as moot sub. nom.*, *Center for Science in the Public Interest* v. *Regan*, 727 F.2d 1161 (D.C. Cir. 1984) (invalidating rescission of labeling regulations for alcoholic beverages); *see also* Garland, *supra* note 24.

[27] The sequence for E.O. 12,291 deregulation is as follows: 1) proposal by agency for rule; 2) review by OMB for cost-benefit analysis; and 3) repeal of proposed rule by agency. *Cf.*, Smythe, *Judicial Review of Rule Rescissions*, 84 **Colum. L. Rev.** 1928, 1948 (1984) (describing sequence of events from birth to death of a regulation under traditional deregulation model).

[28] See, e.g., **B. Ackerman & W. Hassler, Clean Coal/Dirty Air** (1981) (describing New Deal ideal affirming agency expertise).

[29] See Overton Park, 401 U.S. at 415 (Secretary's decision entitled to presumption of regularity).

[30] See, e.g., Stewart, Reformation of American Administrative Law, 88 **Harv. L. Rev.** 1667 (1975) (describing ways in which agency rulemaking has become increasingly characterized by public participation); Gellhorn, Public Participation in Administrative Proceedings, 81 **Yale L.J.** 359 (1972).

[31] These communications may be reflected in OMB briefing books on an agency rulemaking, see Hearings on Asbestos, supra

note 8, at 128-33 (containing EPA official's handwritten notes of cover memorandum summarizing OMB Director David Stockman's briefing book on asbestos), or in formal correspondence or memoranda from OMB to the agency, see id. at 246-52 (letter from top OMB official to Acting Deputy Administrator of EPA outlining "flaws" in withdrawn draft proposals).

[32] Such communications may be reflected in notes by agency officials on OMB telephone calls, see Hearings on Asbestos, id. at 125 (notes expressing OMB concern that proposed EPA phasedown rule on asbestos not cost-effective).

[33] See, e.g., Overton Park, 401 U.S. at

411-13 (where statute indicated that protection of parkland was to be given paramount importance, Secretary of Transportation was prohibited from balancing benefit of parkland preservation against costs); see also American Textile Manufacturers Institute v. Donovan, 452 U.S. 490, 509 (1981).

[34] There may be plainly unlawful influences on the rulemaking process as a result of OMB's political clout. See, e.g., Investigation of EPA, supra note 4, at 287 (Daniel testimony) (former EPA chief of staff testifying regarding threatening telephone call from high-ranking OMB official).

[35] See, e.g., Pillsbury Company v. FTC, 354 F.2d 952 (5th Cir. 1966) (commission

order vacated where thrust of senators' comments and questions was directed to correctness of commission's approach in specific case); _D.C. Federation of Civic Ass'ns_ v. _Volpe_, 459 F.2d 1231, 1245-48 (D.C. Cir. 1971), _cert. denied, sub nom._, _Volpe_ v. _D.C. Federation of Civic Ass'ns_, 405 U.S. 1030 (1972).

Clearly, Executive policy guidance may be permissible, _see Sierra Club_ v. _Costle_, 657 F.2d 298 (D.C. Cir. 1981), and thus distinguishable from congressional intermeddling in agency rulemaking. However, raw political influence exercised by OMB is a different matter from Executive policy guidance and more analogous to the proscribed congressional influence discussed *supra*.

[36] Courts need to compare the agency starting point in a rulemaking with the position taken by OMB, and then examine the rule that is finally issued by the agency. For example, in the *Public Citizen* case, discussed *supra* note 23, OMB was opposed to the STEL and OSHA subsequently issued a standard that deleted the STEL. Where the court can view this intermediate step of OMB involvement in the rulemaking, it can properly determine why the final rule issued by the agency differed from the agency's original position.

[37] In E.O. 12,291 rulemakings, courts should be especially sensitive to *ex parte*

contacts because E.O. 12,291 creates a new point of access to the agency rulemaking process, namely, OMB. See Rosenberg Report, supra note 1, at 62.

[38] See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 56 (D.C. Cir. 1977), cert. denied, 434 U.S. 829 (1978); but see Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977) (ex parte contacts bar limited to cases where "competing claims to a valuable privilege").

[39] Olson proposes a comprehensive docketing system. See Olson, supra note 1, at 75-77. If Olson desires his proposal to reach the substance of covered communications, the solution fails to highlight the importance of the courts

taking a "hard look" approach where there are "danger signals" indicating an abrupt change in agency policy. By building on the analysis of the deregulation cases, this Note supplies a legal basis for taking such a "hard look" in E.O. 12,291 rulemakings.

[40] *See, e.g.*, *DOJ Memorandum*, *supra* note 1, at 448 (E.O. 12,291 fulfills President's constitutional responsibility to "take care that the Laws be faithfully executed" by promoting coordinated system of regulation); Department of Justice, Office of Legal Counsel, Memorandum for Honorable David Stockman, Director of Office of Management and Budget, *Re: Contacts Between OMB and Executive Branch Agencies Pursuant to Executive Order 12291*, April 24, 1981, at 2

(on file with *The Yale Law Journal*) (no legal duties on Director or staff of OMB to refrain from communicating with rulemaking agencies) [hereinafter cited as *DOJ Memorandum on OMB Contacts*]; *c.f.*, Strauss and Sunstein, *supra* note 1, at 11 (Constitution's choice of unitary executive justifies presidential involvement in rulemaking activities of federal agencies).

[41] OMB reviews agency budgets, *see* Olson, *supra* note 1, at 6; sets agency personnel ceilings, *see* *OMB Circular A-64 (Revised): Position Management Systems and Employment Ceilings* (1980); among its myriad powers and responsibilities, *see* Olson, *supra* note 1, at 7, n. 12.

[42] *See, e.g.*, *DOJ Memorandum*, *supra* note 1, at 489-90 (President may consult with those having statutory decisionmaking responsibilities, as long as President does not divest administrative officer of ultimate statutory authority); E.O. 12,291 § 3(f)(3) ("nothing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law").

[43] The Department of Justice argues that the President participates in the deliberative process in his duty to "supervise and guide" the agencies by providing factual analyses or legal and policy arguments. *See* *DOJ Memorandum on OMB Contacts*, *supra* note 40, at 8.

[44] *See* **U.S. CONST.**, art. II, § 3.

Rosenberg disputes the view that Article II grants a general management power to the President to control the administrative decisionmaking process. See Rosenberg Report, supra note 1, at 30-34. See also Asbestos Report, supra note 4, at 122.

[45] The Department of Justice cites United States v. Nixon, 418 U.S. 683 (1974), for the proposition that there is a constitutionally-based privilege for certain Executive Branch communications. See DOJ Memorandum on OMB Contacts, supra note 40, at [illegible]. While Nixon discussed the President's privilege of confidentiality (but found it not to exist in the context of a criminal trial), 418 U.S. at [illegible], commentators have questioned generally whether executive

privilege is relevant in the E.O. 12,291 context. See, e.g., Rosenberg, Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291, 80 Mich. L. Rev. 193, 242 (1981).

[46] See U.S. v. Morgan, 313 U.S. 409, 422 (1941) (Secretary of Agriculture should never have been examined at trial concerning rate-making decision); National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1144-45 (2d Cir. 1974), cert. denied, sub nom., National Nutritional Foods Ass'n v. Schmidt, 419 U.S. 874 (1974) (strong showing of bad faith required before probing of mind allowed).

While the *Morgan* doctrine still constitutes a general prohibition, there has been some erosion in the doctrine. *See, e.g.*, *Overton Park*, 401 U.S. at 420 (court may require administrative officials to give testimony).

[47] *See* Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(5) (1982) (exemption from disclosure for inter-agency or intra-agency memoranda or letters which would not be available to party other than an agency in litigation with the agency). In practice, FOIA has not been as broad an exemption as the *DOJ Memorandum on OMB Contracts*, *supra* note 40, would imply. *See, e.g.*, *National Courier Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 516 F.2d

1229, 1242 (D.C. Cir. 1975) (exceptions to non-disclosability under FOIA of intra-agency deliberative memoranda include (1) those parts of such memoranda that are purely factual, and (2) memoranda adopted by agency as basis of decision).

[48] This conception was explicitly recognized in Sierra Club, 657 F.2d at 406 (D.C. Cir. 1981) (key executive policymakers cannot be isolated from each other and from Chief Executive).

[49] See, e.g., Strauss and Sunstein, supra note 1; Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 **Col. L. Rev.** 573, 599 (President is to be unitary, politically accountable head of government).

[50] *See* APA, 5 U.S.C. {{ 553 *et seq.* (1982) (outlining rulemaking procedures); *see also Report on the Administrative Procedure Act* (Comm. Print 1945), *reprinted in Administrative Procedure Act: Legislative History*, Senate Comm. on the Judiciary, 79th Cong., 1st Sess. 256 (1946) (APA bill leaves agency wide latitude to frame procedures) [hereinafter cited as *APA Legislative History*].

[51] *See*, *e.g.*, Strauss and Sunstein, *supra* note 1, at 15-18 (indicating, *inter alia*, that unlike statutory authority for coordination granted to President by Budget Act, agency heads enjoy authority under governing statutes).

[52] *See*, *e.g.*, *supra* text accompanying notes 8-14.

[53] *See supra* note 47 (discussing disclosability under FOIA of intra-agency deliberative memoranda).

To the extent that OMB input is reflected in agency memoranoa, and these memoranda are "purely factual" in nature, they are not covered by Exemption 5 of FOIA. There are two alternative grounds for considering these memoranda "purely factual": the memoranda reflect a factual recording of the OMB position by the agency or the OMB cost-benefit analysis itself is a factual matter, not a policy judgment.

[54] *See Sierra Club*, 657 F.2d at 407 (EPA was not required to docket face-to-face

policy session involving President and EPA officials during post-comment period). In E.O. 12,291 rulemakings, there have been no reported cases involving direct presidential involvement, and even if the OMB staff is considered an agent of the president, the staff is not communicating a policy argument as in _Sierra Club supra_.

[55] _See, e.g._, Morrison, _Presidential Involvement in Informal Rulemaking: Striking the Proper Balance_, 56 **Tul. L. Rev.** 879, 886 (1982) (President, and his assistants, should be treated "just like everyone else" in recording and docketing written and oral communications).

[56] In the _Public Citizen_ case, discussed _supra_ note 23, Executive Branch parties to

the rulemaking included the Veterans Administration, the Department of Health and Human Services, the Department of the Army, EPA, and the Department of the Interior. See Joint Appendix to Brief - Volume II, 552-62, Public Citizen Petitioners Brief, supra note 23.

[57] See supra note 4 (discussing pattern of undocketed communications between agency and OMB).

[58] See supra text accompanying note 41 (discussing powers of OMB). In Public Citizen, discussed supra note 56, the Veterans Administration, for example, has no special leverage over OSHA; OMB, by contrast, does have leverage over OSHA by

virtue of its various powers, and it is a mistake to ignore this leverage in considering OMB's role in the rulemaking process.

[59] *See*, *e.g.*, Olson, *supra* note 1, at 43-46 (OMB exercises *de facto* veto power which displaces EPA discretion).

[60] *See*, *e.g.*, *Public Citizen Petitioners' Brief*, *supra* note 23, at 51 (Secretary of Labor ceded decisionmaking responsibility to OMB or had his authority taken away from him).

[61] *See*, *e.g.*, K. **Davis, 1982 Supplement to Administrative Law Treatise** (6:40, at 150 (E.O. 12,291 does not technically transfer power from rulemaking agency to President, but in reality it does so given

threat of presidential power of removal).

[62] *See*, *e.g.*, *EDF* v. *Thomas*, *supra* note 9 (EPA rulemaking delayed by OMB review process).

[63] *See supra* note 46.

[64] *See* 5 U.S.C. (553(c) (1982) (requiring general statement of basis and purpose for rule).

[65] For origins of the "hard look" doctrine, *see*, *e.g.*, *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (if satisfied that agency has taken a hard look at issues with use of reason and standards, court will uphold findings if agency's path may reasonably be discerned); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 68-69 (D.C.

Cir. 1976), _cert._ _denied_, _sub_ _nom._, _DuPont_ v. _EPA_, 426 U.S. 941 (1976) (Leventhal, J., concurring).

For subsequent development of the doctrine, _see_, _e.g._, Garland, _supra_ note 24, at 525-61 (tracing development of "substantive" hard look approach which set more demanding standard of review than earlier doctrine); _see_ _also_ _infra_ text accompanying notes 80-84.

[66] If OMB is considered the quasi-decisionmaker, then the court might apply almost the same degree of scrutiny to OMB's input to the E.O. 12,291 rulemaking process as it does where the agency is the exclusive decisionmaking authority. At a practical

level, by taking a "hard look" at agency deliberations, courts will be able to scrutinize closely OMB input to agency decisionmaking.

[67] *See* 401 U.S. 402.

[68] *See* 411 U.S. 138.

[69] In *Overton Park*, the Court instructed the district court on remand to conduct its review "based on the full administrative record that was before the Secretary at the time he made his decision." *See* 401 U.S. at 420. In *Camp*, the Court reaffirmed the *Overton Park* conclusion that review should be conducted on the basis of the administrative record. *See* 411 U.S. at 142.

[70] *See Overton Park*, 401 U.S. at 420. On remand, the district court held a twenty-

five day trial. *See Citizens to Preserve Overton Park v. Volpe*, 335 F.Supp. 873, 878 (D. Tenn. 1972); *see also Camp*, 411 U.S. at 142-43.

[71] For an excellent discussion of these exceptions, *see* Stark & Wald, *supra* note 21.

[72] *See, e.g.*, *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 708 (D.C. Cir. 1971) (to prevent development of secret law within Commission, court must require it to disclose orders and interpretations which it actually applies in cases before it); *National Courier Ass'n*, 516 F.2d at 1229; *see also* Stark & Wald, *supra* note 21, at 347-48; McMillan & Peterson, *supra* note 21, at 342, n. 54.

[73] *See Environmental Defense Fund, Inc.*

v. Blum, 458 F. Supp. 650, 661 (D.D.C. 1978).

[74] For example, in the Public Citizen case, supra note 23, petitioners are in a weaker litigation posture where there is less information in the record pertaining to OSHA communications with OMB in support of the STEL.

[75] See, e.g., County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1383-84 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978) (program option document contained information germane to decision and not duplicated in record); but see Madison County Bldg. & Loan Ass'n v. Fed. Home Loan Bank, 622 F.2d 393, 397 (8th Cir.

1980) (effective judicial review will not necessarily be frustrated without more detailed statement of reasons).

[76] *See* Stark & Wald, *supra* note 21, at 345.

[77] *See* *City Fed. Sav. & Loan Ass'n v. Fed'l Home Loan Bank*, 600 F.2d 681, 688 (7th Cir. 1979).

[78] Normally, because of the *Morgan* prohibition against probing the mental processes of the decisionmaker, discussed *supra* note 46, courts do not engage in this kind of review. Nevertheless, precedent exists for courts trying "through an ad hoc effort to reconstruct what happened in a particular case." Pedersen calls this approach to compiling a record

the "historical" approach, as opposed to the "procedural" approach where the record is compiled by the agency under a "given obligatory set of procedures." See Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 62-64 (1975). Given the special quality of rulemaking under E.O. 12,291, courts should follow the "historical" approach since the courts will be required to ferret out what actually happened in the rulemaking.

[79] See supra text accompanying note 65.

[80] See 463 U.S. 29 (1983).

[81] See Garland, supra note 24, at 545 (discussing two-pronged substantive approach to hard look). For discussion of hard look doctrine earlier in its evolution, see S.

Breyer & R. Stewart, Administrative Law and Regulatory Policy 292 (1979). The principal difference between the earlier and current versions of the hard look doctrine centers on which party takes the hard look. Formerly, the purpose of the doctrine was to "ensure only that the *agency* had taken a hard look at the facts and issues before it, not that the *court* do so." *See* Garland, *supra* note 24, at 553 (emphasis in original). Currently, the doctrine requires that the court take a hard look at the agency's decision.

[82] In *State Farm*, 463 U.S. at 52-53, the Court concluded, for example, that there was "no direct evidence in support of the agency's finding that detachable automatic

belts cannot be predicted to yield a substantial increase in usage."

[83] The *State Farm* Court "in effect concluded that, given the available alternatives, factual record, and congressional purpose, a reasonable administrator would not have made the choice" that the Department of Transportation did. *See* Garland, *supra* note 24, at 548.

[84] *See supra* note 26 (discussing deregulation cases).

[85] *See* Olson, *supra* note 1, at 77 (docketing is only way court can take "hard look" required to determine agency rationality). This Note agrees that the "hard look" is in jeopardy, but disagrees

with Olson as to the optimal solution. See supra note 39.

[86] At a practical level, the courts could ensure a complete record by refusing to certify the record submitted by the agency pursuant to **Fed. R. App. P. 17** if the court has reason to believe that documents pertaining to agency-OMB communications are not included. The court will take this "hard look" at the record where petitioner has established the presence of danger signals. See infra text accompanying notes 89-92. In addition, the courts might follow the Overton Park remand technique of requiring testimony of administrative officials where the documentary record submitted may not adequately disclose the nature of the

agency-OMB interactions. See supra text accompanying note 70.

[87] For a discussion of danger signals, see supra text accompanying notes 24-25.

[88] See Asbestos Report, supra note 4, at 118 ("the requirements of Executive Orders 12291 and 12498 may be properly viewed as an integrated process for presidential review and control of agency development of rules, from initial conception and formulation to final promulgation").

[89] Such a flexible application of the danger signals analysis is necessary because OMB increasingly intervenes early in rulemakings under E.O. 12,291 in ways that may significantly alter the agency's

intended course of action. In addition, to focus on the issuance of final rules alone would be ineffective, since in the current regulatory climate, not many final rules are being issued.

[90] For example, in the _Public Citizen_ case, discussed _supra_ note 23, the proposed rule published by OSHA on April 21, 1983 made it clear that OSHA was considering the imposition of a STEL. _Compare_ 48 Fed. Reg. 17283, 17284 (April 21, 1983) (agency considering STEL) _with_ 49 Fed. Reg. 25734, 25775 (June 22, 1984) (agency deletes STEL).

[91] One scenario is where OMB strongly influences the issuance of a notice of proposed rulemaking. In this situation, the notice of proposed rulemaking itself is the

subject of OMB pressure; hence to establish danger signals, the focus of the analysis shifts to a comparison of the agency's version of the notice of proposed rulemaking and the OMB-influenced notice of proposed rulemaking which is published in the *Federal Register*.

Where the court notes danger signals at this early stage in the challenged rulemaking, it should require the agency to include in its record the agency version of the notice of proposed rulemaking. Petitioner might be able to make a preliminary showing of danger signals under these circumstances by relying on the FOIA mechanism. *See supra* notes 47, 53.

[92] *See*, *e.g.*, *Asbestos Hearing*, *supra*

note 4 (discussing sharp reversal announced by EPA at press conference and original EPA position reflected in four major policy statements).

[93] *See, e.g.*, McMillan & Peterson, *supra* note 21, at 347 (courts should insist on detailed affidavits regarding filing system used in rulemaking and scope of file search conducted).

[94] *See* Fed. R. Civ. P. 53.

[95] *See, e.g.*, Diver, *Policymaking Paradigms in Administrative Law*, 95 Harv. L. Rev. 393 (1981) (describing "comprehensive rationality" as one of two models of policymaking process).

[96] *See Rosenberg Report*, *supra* note 1, at 46.

[97] Id. at 50.

[98] See State Farm, 463 U.S. at 43.

[99] See id. at 42; see also Garland, supra note 24, at 553 (courts appear to be using hard look review to ferret out agency actions motivated by considerations inconsistent with legislative purpose).

[100] See State Farm, 463 U.S. at 42.

[101] See, e.g., Asbestos Hearing, supra note 4, at 30 (EPA had taken almost five years to develop regulatory strategy to deal with major risks of asbestos, which was subsequently derailed in negotiations between OMB and EPA in three-week period).

[102] Se APA Legislative History, supra note 50, at 256 (centralized agency

undesirable because "such an office . . . will be political, will interfere with the independent operations of boards and commissions, [and] will constitute a superadministrative agency").

[103] **U.S. Attorney General's Committee on Administrative Procedure, Final Report of Attorney General's Committee on Administrative Procedure** 102 (1941) (knowledge of agency is rarely complete, and agency must always learn frequently clashing viewpoints of those whom its regulations will affect).

[104] *See* 5 U.S.C. (553 (1982).

[105] *See*, *e.g.*, Stewart, *supra* note 30, and Gellhorn, *supra* note 30.

[106] *See*, *e.g.*, Stewart, *supra* note 30,

at 1723-60 (describing development of model of interest representation).

[107] Hybrid rulemaking statutes combine informal rulemaking procedures with formal adjudication procedures. The Toxic Substances Control Act of 1976 ("TSCA") is an example of such a statute. *See* 15 U.S.C. § 2605(c)(3) (1982).

[108] *See* *Asbestos Report*, *supra* note 4, at 98.

[109] *See* *supra* text accompanying note 39.

[110] *See, e.g.*, *U.S. Lines, Inc.* v. FMC, 584 F.2d 519 (D.C. Cir. 1978) ("*ex parte* communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the

decisionmaking process").

[111] See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 55 (D.C. Cir. 1977) ("we see no difference between assertions of facts and expert opinion tendered by the public . . . and that generated internally in an agency: each may be biased, inaccurate, or incomplete -- failings which adversary comment may eliminate").

[112] See id. at 54. "As a practical matter, Overton Park's mandate means that the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing

courts by persons participating in agency proceedings. This course is obviously foreclosed if the agency itself does not disclose the information presented." See also U.S. Lines, Inc., 584 F.2d at 541-42; Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393-94 (D.C. Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 649 (D.C. Cir. 1973).

[113] See Asbestos Report, supra note 4, at 102.

[114] See, e.g., Olson, supra note 1, at 56 (indicating that OMB encourages ex parte contacts by sometimes actively solicitng industry comments on specific rules).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No.
) 85-1747
LEE M. THOMAS, Administrator,)
U.S. Environmental Protection Agency,)
et al.,)
)
Defendants.)

FILED

JAN 23 1986

CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

MEMORANDUM

This matter comes before the court on the parties' cross-motions for summary judgment. Plaintiffs' motion has appended to it various public documents as well as documents under seal regarding deliberations between defendants. Defendants' motion, originally filed in July of 1985, was supplemented in December of 1985. This court has allowed groups representing the electric utilities industry to file a single amici curiae brief.

I. Background

In November of 1984, Congress enacted the Hazardous and Solid Waste Amendments of 1984 ("1984 Amendments"), Pub. L. 98-616 (Nov. 8, 1984), which amended the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6924. RCRA is a comprehensive statute designed to regulate the management of hazardous and solid wastes. One of the new amendments, Section 3004(w) of RCRA, 42 U.S.C. § 6924(w), provides that "(n)ot later than March 1, 1985, the (Environmental Protection Agency or "EPA") Administrator shall promulgate final permitting standards under this section for underground tanks that cannot be entered for inspection."

This deadline was not met. Plaintiffs contend that EPA's ability to promulgate the regulations was further prevented by the unlawful interference of the Office of Management and Budget ("OMB"). Plaintiffs, Environmental Defense Fund Inc. ("EDF") and two individuals brought suit in this court on May 30, 1985. Plaintiffs seek an order that EPA must promulgate the regulations by April 25, 1986. Plaintiffs also seek injunctive relief against OMB to prevent similar interference in the future.

Defendants EPA and OMB want until June 30, 1986 to promulgate the regulations. Further, they contend that this court has no jurisdiction to grant injunctive relief against OMB of this kind. The electric utilities groups, Edison Electric et al., agree with defendants.

II. Jurisdiction

Both parties agree that RCRA gives this court jurisdiction to order the Administrator of EPA to perform nondiscretionary duties and allows this court to set a date by which EPA must promulgate the hazardous waste tank regulations. 42 U.S.C. § 6972(a)(2). The only real dispute is by which deadline EPA can reasonably be ordered to promulgate final standards.

Jurisdiction to grant injunctive relief against OMB is the more controversial aspect of this suit. At the crux of this disagreement is the lawfulness of OMB's activity pursuant to the Congressional deadline and pursuant to Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981), 3 C.F.R. 127 (1982) ("EO 12291").

EO 12291 directs executive agencies to submit all proposed and final rules to OMB for pre-publication review to determine if they are consistent with certain criteria (e.g., the regulations must be based on adequate information, the potential benefits must outweigh the potential costs, the net benefits to society must be maximized, and the alternative involving the least net cost to society must be chosen). Also, the order states that "major rules" are submitted to OMB for review 60 days before publication of proposed rules and 30 days prior to publication of final rules. All other rules are submitted to OMB for review 10 days before publication of proposed rules and 10 days prior to publication of final rules. OMB is deemed to have concluded its review after expiration of these time periods unless it notifies the agency that it has extended its review pursuant to Section 3(f). This extension may be indefinite.

OMB's authority is qualified by the rule. Section 8(a)(2) of EO 12291 exempts regulations "for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order." Further, "(n)othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law." Sec. 3(f)(3). The executive order also limits OMB's authority by authorizing OMB to exercise its review only "to the extent permitted by law." Secs. 2, 3(a), & 6(a).

Plaintiffs contend that OMB's interference with the promulgation of the EPA regulations unlawfully delayed their promulgation, in violation of both the RCRA amendments and the Administrative Procedure Act ("APA"), 5 U.S.C. 706. Plaintiffs argue that under 28 U.S.C. § 1331 and § 1361, this court may exercise inherent equitable powers to grant injunctive relief preventing further OMB interference.

Defendants respond that ordering OMB to refrain from reviewing any proposed regulations under RCRA whenever such review would delay promulgation of the regulation beyond a statutory deadline is an unjustifiable and inappropriate use of this court's power. As defendants see it, neither the RCRA nor the APA gives this court jurisdiction over OMB in this matter. Further, there is no jurisdiction to enforce any constraints found within the Executive Order itself.

There is no doubt that this court has jurisdiction over both plaintiffs' RCRA and APA claims against the Administrator of EPA. 42 U.S.C. 6972(a)(2) and 5 U.S.C. 702. In compelling EPA to perform non-discretionary duties, however, it is also appropriate to fashion equitable relief to ensure that such duties are performed without the interference of other officials acting outside the scope of their authority in contravention of federal law. Though injunctive relief is not appropriate in these circumstances, as discussed below, there can be no doubt that an executive agency or agencies can be enjoined by this court from failing to execute laws enacted by Congress.

III. Discussion

While the merits of relief against EPA and relief against OMB can be discussed separately, first a discussion of what exactly caused the delay in promulgating the regulations is in order. From the documents released by OMB and EPA under seal, an interesting picture of OMB involvement in the promulgation process emerges.

Congress set March 1, 1985, as the deadline for promulgating the regulations. OMB commenced its review of the proposed permitting standards on March 4, 1985. Since these were not "major rules" under the meaning of EO 12291, EPA anticipated that OMB would complete its review within 10 days. On March 15, 1985, EPA staff briefed OMB staff on the proposed regulations. OMB refused to clear the regulations and on March 25, 1985, notified EPA that its was extending its review of the proposed regulations. OMB apparently wanted EPA to gather additional information prior to promulgating the regulations even though it would delay the process. By April 10, 1985, EPA had still not received any formal comments from OMB.

By April 12, 1985, it was clear that OMB had serious differences with EPA over what regulations to propose. At a meeting of April 16, 1985 between OMB and EPA staff members, OMB sought significant changes in the proposed regulations in four areas. The idea, apparently, was to shift the goal of the regulations away from EPA's philosophy of containing all leaks of waste disposals to OMB's philosophy of preventing only leaks of waste that can be demonstrated by risk analysis to threaten harm to human health.

Internal disagreement within OMB further delayed OMB's consideration of the regulations. Some OMB staff members apparently felt that OMB should not be dictating substantive policy decisions to EPA while others felt the precedent being set an important one for OMB review of other RCRA regulations.

After this suit was filed on May 30, 1985, OMB continued to seek specific changes in EPA's proposed regulations as well as changes not previously discussed. After various negotiations regarding the substance of the regulations, OMB completed its review and cleared the proposed regulations on June 12, 1985. The EPA Adminstrator signed them June 14, 1985 and the proposed regulations were published in the Federal Register on June 26, 1985, 50 Fed. Reg. 26444, after OMB approved some last-minute stylistic changes made by EPA staff.

A. The Final Date for Promulgating the Regulations

The parties agree and this court finds that the Administrator of EPA has failed to comply with his non-discretionary duties under § 3004(w) of the RCRA. There is disagreement, however, about when the final regulations should be ordered promulgated. Plaintiffs contend that a reasonable time is April 25, 1986 while defendants prefer a deadline of one year from the date the regulations were proposed (i.e. June 30, 1986).

Defendants justify their time-table in an affidavit filed by John H. Skinner, Director of EPA's Office of Solid Waste ("OSW"). Public comments were received on the proposed regulations during a two-month period in the summer of 1985. EPA's technical staff evaluated these comments from September through November 1985. After completing a risk assessment, EPA will develop final draft rules by the end of February 1986. By mid-April, 1986, an EPA work group will comment on the final draft and OSW will complete a revised draft in light of these comments. By the end of May, 1986, OSW will prepare the final rulemaking package for senior level review within EPA (known as "Red Border" review) and for OMB review. The time for doing this will be streamlined and the two agencies review will be done concurrently. The regulations will then become final by June 30, 1986.

Plaintiffs argue that one year is unnecessarily long. EPA has not received as many public comments as was anticipated. EPA's prior and current promulgation schedules are in the neighborhood of nine months, not one year (e.g., the schedule now being followed for comparable small generator rules). As plaintiffs see it, this is the kind of unwarranted delay which this and other courts have struck down before. NRDC v. Ruckelshaus, 14 ELR 20817 (D.D.C. Sept. 14, 1984); State of New York v. Gorsuch, 554 F. Supp. 1060 (S.D.N.Y. 1983); Environmental Defense Fund v. Gorsuch, 17 ERC 1099 (D.D.C. 1982); Sierra Club v. Gorsuch, 551 F. Supp. 785 (N.D. Cal. 1982); State of Illinois v. Gorsuch, 530 F. Supp. 340 (D.D.C. 1981).

Promulgation of regulations 16 months after a Congressional deadline is highly irresponsible. Congress was aware of the complexity of these hazardous waste regulations and yet decided that quick promulgation was of paramount importance. Now that the damage is done, however, this court must fashion an equitable remedy that best achieves the Congressional purpose. This court has previously felt bound to accept a proposed schedule by EPA where EPA demonstrates through affidavit that it is "proceeding in good faith," Illinois v. Gorsuch, 12 ERC 1597, 1598 (D.D.C. 1979), rather than mandate flat guidelines of its own. NRDC v. Train, 510 F.2d 697, 712-13 (D.C. Cir. 1975). After reviewing the proposed schedule set forth by EPA in this case, it appears that the June 30, 1986 deadline is reasonable. This date is only two months later than the date sought by plaintiffs. Therefore, it is ordered that the regulations be promulgated by that time. Failure to do so would be capricious and would merit stronger equitable treatment.

B. OMB's Interference with the Promulgation Process

From the discussion above, it seems clear that OMB did contribute to the delay in the promulgation of the regulations by insisting on certain substantive changes. The released documents show that EPA was ready to announce proposed regulations in the Federal Register as early as March 31, 1985, but due to OMB it did not happen until three months later.

A certain degree of deference must be given to the authority of the President to control and supervise executive policymaking. Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1982) (regarding whether oral communications between EPA and the White House must be docketed on the rule-making record when EPA revises Clean Air Act provisions). Yet, the use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's

Article II powers.

Such concerns were noted by Congress when EO 12291 was passed. In order to ensure the legality of the operation of EO 12291, James C. Miller III, now the director but then the administrator of OMB's Office of Information and Regulatory Affairs ("OIRA"), appeared before a congressional committee and stressed the importance of construing narrowly the authority granted to OMB. Mr. Miller testified:

> President Reagan's Executive order imposes on the agencies only "to the extent permitted by law" and only to the extent that its terms would not "conflict with deadlines imposed by statute or by judicial order." The limited application of (EO 12291) is a crucial point, one that insures (its) legality and the legality of actions pursuant to (it). ... If a statute or a court order establishes a date for a rulemaking action, the Executive Order 12291 cannot delay that action.

Testimony of James C. Miller III, in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigation of House Comm. on Energy & Commerce, 97th Cong., 1st Sess 46 (1981).

The Justice Department has also emphasized that EO 12291 must be construed narrowly to survive legal challenge.

> (I)t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.

U.S. Department of Justice, Office of Legal Counsel Opinion on EO 12291, February 13, 1981.

This court has previously found that in certain egregious situations, statutory delay caused by OMB review is in contravention to applicable law under Section 8(a)(2) of EO 12291 and therefore that no further OMB review could occur. NRDC v. Ruckelshaus, 14 ELR 20817, 20818 (D.D.C. 1984). In Ruckelshaus, however, by the time the court order issued, EPA was six years passed the deadline set by Congress. In the case at bar, enjoining OMB from interacting at all with EPA simply because OMB might cause delay past the new judicial deadline is premature and an unwarranted intrusion into discretionary executive consultations.

There is, however, some credence in plaintiffs' fear that the regulations due June 30, 1986, may still be delayed by OMB. While defendants claim that OMB review of the final regulations in May of 1986 will be concurrent with EPA senior level review, such concurrent review of the proposed regulations in the spring of 1985 resulted in considerable delay. Concurrent review does not eliminate delay, since any changes sought by OMB must then be reviewed by senior level EPA officials. This court declares therefore that further review by OMB which creates any delay in meeting the June 30, 1986 deadline is unreasonable and unacceptable. EPA is obligated to promulgate the regulations by that date and may not use the excuse of OMB review to refrain from doing so.

Plaintiffs also protest that OMB routinely reviews other EPA regulations subject to statutory deadlines even if such review will delay promulgation beyond the deadline. Unless this court declares that OMB has no authority to delay promulgation of all EPA regulations beyond statutory deadlines, OMB will continue to do so both for the Section 3004(w) standards and for other RCRA regulations subject to statutory deadlines in the 1984 amendments. Through answers to interrogatories, plaintiffs show that EPA submitted 169 regulations to OMB which were subject to statutory or judicial deadlines, and on 86 occasions OMB extended its review beyond the time periods outlined in EO 12291. OMB's propensity to extend review has become so great that EPA keeps a running record of the number of its rulemaking actions under extended review by OMB and the resulting delays. The average delay per regulation is 91 days; total delays were more than 311 weeks. Apparently Section 8(a)(2) of EO 12291 is simply ignored.

Congress clearly is concerned with OMB's use of EO 12291 with regard to the deadlines set within the 1984 Amendments. The House Committee report that accompanied the 1984 Amendments states:

> The Committee is extremely concerned that EPA has not been able to comply with past statutory mandates and timetables, not just for RCRA, but for virtually all its programs... . The Administrator's ability to meet this deadline (for publishing a schedule for land disposal ban decisions) as with all other deadlines in this bill, shall not be impaired in any way whatsoever by Executive Order 12291.

Hazardous Waste Control and Enforcement Act of 1983, Report of House Comm. on Energy and Commerce, 98th Cong., 1st Sess., May 17, 1983, at 34, 35, 1984 U.S. Code Cong. & Admin. News 5576, 5593-94.

The Hazardous and Solid Waste Amendments of 1984 added at least 44 new deadlines to RCRA, 29 of which must be satisfied within the next 20 months.

This court declares that OMB has no authority to use its regulatory review under EO 12291 to delay promulgation of EPA regulations arising from the 1984 Amendments of the RCRA beyond the date of a statutory deadline. Thus, if a deadline already has expired, OMB has no authority to delay regulations subject to the deadline in order to review them under the executive order. If the deadline is about to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed. From its tracking system, EPA can determine when further delay due to OMB review will result in a deadline being missed.

While this may be an intrusion into the degree of flexibility the executive agencies have in taking their time about promulgating these regulations, this is simply a judicial recognition of law as passed by Congress and of the method for dealing with deadlines laid down by the President himself. Such a recognition is not new. See NRDC v. Gorsuch, 17 ERC 2013, 2016 (D.D.C. 1982). Indeed, OMB itself admits that it cannot prevent an agency from complying with statutory requirements. Yet declaratory relief is necessary to ensure compliance with the clearly expressed will of Congress. This is not an inappropriate interference with the interaction of executive agencies; all such interaction may continue absent a "conflict with deadlines imposed by statute or by judicial order." Sec. 8, EO 12291.

An appropriate Order accompanies this Memorandum.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, et al.,

Plaintiffs,

v.

LEE M. THOMAS, Administrator, U.S.
Environmental Protection Agency, et al.,

Defendants.

Civil Action No.
85-1747

FILED
JAN 28 1986
CLERK, U.S. DISTRICT COURT,
DISTRICT OF COLUMBIA

ORDER AND DECLARATION

This matter comes before the court on the parties' cross-motions for summary judgment. After consideration of the motions, the oppositions thereto, the amici curiae brief, and the entire record herein, it is, by the court, this 28th day of January, 1986,

ORDERED that defendants' motion for leave to file a response to plaintiffs' December 23, 1985 submission is granted; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted in part and denied in part, and defendants' motion for summary judgment (as supplemented) is granted in part and denied in part; and it is further

DETERMINED AND DECLARED that defendant Environmental Protection Agency has failed to perform its mandatory duty under Section 3004(w) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6924(w); and it is further

ORDERED that no later than June 30, 1986, defendant

Environmental Protection Agency shall promulgate final permitting standards for underground tanks pursuant to Section 3004(w) of RCRA; and it is further

DETERMINED AND DECLARED that defendant Office of Management and Budget has no authority to delay the promulgation of final permitting standards for underground tanks pursuant to Section 3004(w) of RCRA by withholding approval of the standards past June 30, 1986; and it is further

DETERMINED AND DECLARED that defendant Office of Management and Budget has no authority to delay the promulgation of EPA regulations arising from the Hazardous and Solid Waste Amendments of 1984 of the RCRA, Pub. L. 98-616 (Nov. 8, 1984), by withholding approval past statutory or judicial deadlines.

Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1747
(Flannery, J.)

ENVIRONMENTAL DEFENSE FUND, et al.,

Plaintiffs,

v.

LEE M. THOMAS, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, *et al.*, Plaintiffs, v. LEE M. THOMAS, *et al.*, Defendants.	Civil Action No. 85-1747 (Flannery, J.)

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This Memorandum is submitted on behalf of plaintiffs, the Environmental Defense Fund, Pamela R. Ford, and Scotty D. Ford, in support of their motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., and in opposition to defendants' motion for summary judgment.

This action challenges the failure of the Environmental Protection Agency (EPA) to promulgate regulations required by Section 3004(w) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6924(w), by the statutory deadline of March 1, 1985, and the unauthorized actions of the Office of Management and Budget (OMB) to delay EPA's promulgation of these and other regulations beyond statutory deadlines in violation of the clear commands of Congress. Summary judgment should be awarded to plaintiffs because there are no genuine issues of material fact and plaintiffs are entitled to judgment as a matter of law.

Summary

On May 30, 1985 plaintiffs filed a complaint against the Environmental Protection Agency and its Administrator (hereinafter referred to collectively as "EPA") and the Office of Management and Budget and its Director (hereinafter referred to collectively as "OMB"). The complaint alleged that EPA had failed to promulgate regulations required by Section 3004(w) of RCRA by the statutory deadline of March 1, 1985, and that OMB had acted without authority to delay promulgation of these regulations beyond the statutory deadline. On July 15, 1985 defendants filed a motion to stay discovery and a motion for summary judgment seeking an order directing EPA to promulgate the Section 3004(w) regulations by June 30, 1986.

On August 30, 1985 the Court denied defendants' motion to stay discovery and permitted plaintiffs to engage in limited discovery. Plaintiffs were granted leave to file an amended complaint on October 29, 1985. On November 18, 1985 the Court entered a protective order permitting plaintiffs to complete their discovery while protecting from public disclosure material for which defendants asserted a claim of privilege. The Court also directed plaintiffs to file a dispositive motion as well as any supplement to their opposition to defendants' summary judgment motion by December 2, 1985. This memorandum and the accompanying motion for summary judgment are filed pursuant to the Court's directive.[1]

FACTUAL AND STATUTORY BACKGROUND

This case squarely presents the question whether OMB has the authority under Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 19, 1981), 3 C.F.R. 127

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[1] The following abbreviations are used herein. Defendants' Memorandum in Support of Motion for Summary Judgment is referred to as "D.S.J. Mem."; Plaintiffs' Opposition to Defendants' Motion for Summary Judgment is referred to as "P.S.J. Opp."; Defendants' Reply to Plaintiffs' Opposition to Summary Judgment is referred to as "D.S.J. Reply." Pursuant to the Court's order of November 18, 1985, documents designated as "Confidential Material" have been filed with the Court under seal in a separate appendix to this memorandum, "Sealed Appendix," and are referred to as "SA". Documents not subject to the Court's November 18th order are included in a "Public Appendix" to this memorandum and are referred to as "PA".

(1982), to delay promulgation of regulations by EPA beyond deadlines specified by Congress. The material facts in this case are not in dispute. Defendants admit that even though the deadline for promulgation of regulations required by Section 3004(w) of RCRA had arrived, EPA on March 1, 1985 submitted the proposed regulations to OMB for review under Executive Order 12291. Despite the statutory deadline, OMB notified EPA on March 25, 1985 that it was extending its review of the proposed regulations. OMB review continued until June 12, 1985 during which time EPA made significant changes in the proposal to obtain clearance from OMB under Executive Order 12291. OMB review delayed publication of the notice of proposed rulemaking and promulgation of the final regulations beyond the March 1, 1985 deadline. OMB has extended its review under Executive Order 12291 of other proposed and final EPA regulations subject to statutory and judicial deadlines, and has delayed promulgation of such regulations beyond the deadlines specified by law.

Section 3004(w) of RCRA

The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.*, was enacted in 1976 to protect human health and the environment by establishing a comprehensive, "cradle-to-grave" system to regulate the management of hazardous waste.[2] In January, 1981 EPA promulgated permitting standards for tanks in which hazardous waste is stored or treated. 46 *Fed. Reg.* 2802, 2831 (Jan. 12, 1981). These regulations, however, did not apply to many underground tanks.

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[2] RCRA required EPA by April, 1978 to issue permitting standards governing all facilities for the storage, treatment or disposal of hazardous waste. After EPA failed to meet this deadline, plaintiff Environmental Defense Fund ("EDF") brought a successful action against EPA in this Court to compel promulgation of these regulations. *Environmental Defense Fund* v. *Plehn*, No. 78-1715 (D.D.C. 1978).

Promulgation of standards for underground tanks that cannot be entered for inspection was deferred.[3]

Section 3004(w) of RCRA was added by the Hazardous and Solid Waste Amendments of 1984 ("1984 Amendments"). The 1984 Amendments reflected congressional dissatisfaction with EPA's implementation of RCRA. Fundamental changes in the RCRA program were mandated by the 1984 Amendments, which established many new deadlines for EPA action. The first of these deadlines was established by Section 3004(w) which provides that "[n]ot later than March 1, 1985, the Administrator [of EPA] shall promulgate final permitting standards under this section for underground tanks that cannot be entered for inspection." 42 U.S.C. 6924(w). This deadline reflects the urgency Congress attached to regulation of hazardous waste stored in underground tanks and congressional frustration with EPA's long delays in promulgating such regulations.[4]

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3. EPA stated that it was considering a complete ban on storage or treatment of hazardous waste in such tanks in light of several incidents of environmental damage and the difficulty of inspecting such tanks and detecting leaks from them. EPA solicited comments on this and other alternatives for regulating such tanks. 46 Fed. Reg. 2802, 2831 (Jan. 12, 1981).

4. Section 3004(w) was added to the 1984 Amendments as a floor amendment to the House bill offered by Senator Albert Gore, Jr., who was then a Member of the House. Congressman Gore noted that his amendment embodied EPA's then-current schedule for promulgating regulations governing the storage of hazardous waste in underground tanks. See EPA Regulatory Agenda, 48 Fed. Reg. 47902 (Oct. 17, 1983). After discussing the danger posed to human health by the unregulated storage of hazardous waste in underground tanks, Congressman Gore stated that the purpose of his amendment was "to make certain there is no further delay in providing protection from such a hazard." Cong. Record, Nov. 3, 1983, at H9167. Congressman Florio, speaking in support of the amendment, emphasized that "it is extremely important that EPA issue these standards as soon as practicable." Id. The amendment was adopted by voice vote. Id., at H9168.

Executive Order 12291

On February 17, 1981, President Reagan issued Executive Order 12291, 46 Fed. Reg. 13193 (Feb. 17, 1981), 3 C.F.R. 127 (1982). Executive Order 12291 directs executive agencies to submit all proposed and final rules to OMB for review to determine if they are consistent with certain criteria outlined in Section 2 of the executive order.[5]

The requirement that agencies submit to OMB for review all notices of proposed rulemaking and all final rules applies "[e]xcept as provided in Section 8" of the executive order. Id., Sec. 3(c). Section 8 of the executive order exempts certain regulations from the procedures prescribed by the executive order. Section 8(a)(2) provides that the procedures prescribed by the executive order shall not apply to "[a]ny regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order . . . ."

Under the procedures established by the executive order, major rules are to be submitted to OMB for review 60 days prior to publication of a notice of proposed rulemaking, and 30 days prior to publication of a final rule. Executive Order 12291, Sec. 3(c)(2). For all rules other than major rules, notices of proposed rulemaking and final rules are to be submitted to OMB for review at least 10 days prior to publication. Executive Order 12291, Sec. 3(c)(3). OMB is deemed to have concluded its review after expiration of these time periods unless it notifies the agency submitting the rule that it has extended its review pursuant to Section 3(f) of the executive order. Id.,

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5. The criteria in Section 2 of Executive Order 12291 include that the regulations be based on adequate information, that the potential benefits of the regulation outweigh the potential costs, that net benefits to society be maximized, and that the alternative involving the least net cost to society be chosen. Agencies are directed to adhere to these criteria "to the extent permitted by law." (A copy of the executive order previously has been submitted as Attachment A to defendants' motion for summary judgment).

Sec. 3(e)(2).

OMB may extend its review of proposed regulations for an indefinite period of time simply by notifying the agency that submitted the notice that it is extending its review. Id., Sec. 3(f)(1). Section 3(f)(1) of the executive order provides that during OMB's extended review the agency shall "refrain from publishing its . . . notice of proposed rulemaking until such review is concluded." This requirement, however, is also "subject to Section 8(a)(2)," which exempts regulations for which OMB review would conflict with a statutory or judicial deadline.

OMB can extend its review of final rules by notifying an agency that it intends to submit comments on the final rule. The executive order provides that after receiving such notification "the agency shall, subject to 8(a)(2) of this Order, refrain from publishing its . . . final rule until the agency has responded to the [OMB] Director's views, and incorporated those views and the agency's response in the rulemaking file." Id., Sec. 3(f)(2).

OMB's authority is qualified by the executive order's directive that "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law." Id., Sec. 3(f)(3). The executive order also limits OMB's authority by authorizing OMB to exercise its review only "to the extent permitted by law." Id., Secs. 2, 3(a) & 6(a).

OMB's Extended Review of EPA's Proposed Section 3004(w) Standards

Even though Executive Order 12291 exempts from OMB review regulations for which such review "would conflict with deadlines imposed by statute," id., Sec. 8(a)(2), the notice of proposed rulemaking for the Section 3004(w) standards ("proposed permitting standards") was submitted to OMB for review under the executive order on March 1, 1985. Defendants' Answer to Amended Complaint, Par. 22; EPA's Response to Interrogatory #6 (previously filed with the Court as Appendix 2 to Plaintiffs' Motion to Compel). EPA submitted the proposed standards to OMB for review even though the statutory deadline of March 1, 1985 for promulgating the standards had arrived.[6] OMB commenced its review of the proposed permitting standards on March 4, 1985, after the statutory deadline had passed. OMB's Response to Plaintiffs' Interrogatory #3 (previously filed with the Court as Appendix 5 to Plaintiffs' Motion to Compel).

The proposed permitting standards are not a major rule for purposes of Executive Order 12291. EPA Reponse to Interrogatory #12. At the time they were submitted to OMB for review, EPA anticipated that OMB would complete its review within the ten days contemplated by the executive order for OMB review of nonmajor proposed rules. Skinner Deposition at 104, 105 (Appendix 7 to Plaintiffs' Motion to Compel). OMB instead took much longer.

On March 15, 1985 EPA staff briefed OMB staff on the proposed permitting standards.[7] EPA Response to Interrogatory #8 (Appendix 2 to Plaintiffs' Motion to Compel, at 7); OMB Response to Interrogatory #5, Attachment 4 (Appendix 5 to Plaintiffs' Motion to Compel); Defendants' Answer to Amended

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6. EPA and OMB clearly were aware of the statutory deadline for promulgating the permitting standards at the time the proposed standards were submitted to OMB for review under Executive Order 12291. On the cover of the package submitted to OMB was a copy of OMB Form 83, "Request for OMB Review," which states that the proposed standards are being submitted to OMB for review under the executive order. Under the heading "Type of Review Requested" on the form, a box entitled "Statutory or Judicial Deadline" was marked by EPA. Exhibit 23 to Skinner Deposition, attached as document #1 to Public Appendix ("PA-1"). As Dr. Skinner explained during his deposition, the fact that this box was checked meant the agencies were aware "that there is a statutory or judicial deadline for this item." Skinner Deposition at 104 (previously filed with the Court as Appendix 7 to Plaintiffs' Motion to Compel).

7. Present at the March 15, 1985 briefing were three OMB staff (Susan Dudley, Nancy Baldwin, and Richard Brozen) and six EPA staff (Harold Lester, William Kline, Penelope Hansen, John Lehman, Sam Napolitano, and Betsy Tam). EPA Response to Interrogatory #8 (Appendix 2 to Plaintiffs' Motion to Compel).

Complaint, Par. 24. This briefing covered data on the number and type of tanks storing hazardous waste, analysis of more than 2000 incidents of leaking tanks, a description of existing regulations and the need for the proposed standards, as well as discussion of their expected costs and effects. RCRA Hazardous Waste Tank Standards Briefing for the Office of Management and Budget (OMB), March 15, 1985, PA-2.[8] On March 19 and again on March 20, EPA submitted additional material to OMB staff in response to their request for further background information on the proposed tank permitting standards. EPA Response to Interrogatory #5, Attachment C, (Appendix 2 to Plaintiffs' Motion to Compel, at 2-3, 5-7).

OMB refused to clear the proposed permitting standards on the basis of the information EPA had supplied. On March 25, 1985, OMB formally notified EPA that it was extending its review of the proposed permitting standards pursuant to Section 3(f)(1) of Executive Order 12291. A letter from Gail B. Coad, chief of the Regulatory Policy Branch of OMB, notifying EPA of the extension of OMB review is included in the Public Appendix. Coad Letter, Exhibit 24 to Deposition of John H. Skinner, PA-3.

On March 25, 1985, Harold D. Lester, the Program Manager of the Economic Analysis Branch of EPA's Office of Solid Waste, received a telephone call from Susan Dudley, an OMB staff member responsible for reviewing the proposed permitting standards. EPA Response to Interrogatory #9, Appendix 2 to

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8. Although defendants asserted a claim of privilege for this document, and designated a copy of it as "Confidential Material" subject to the Court's November 18th protective order, it is currently part of EPA's public rulemaking docket for the tank permitting standards. (Declaration of Susan Egan, Par. 8, at 3). A copy of the briefing document taken from the public rulemaking docket is in the Public Appendix to this Memorandum. PA-2.

Plaintiffs' Motion to Compel, at 10.[9] A memorandum by Mr. Lester summarizing their conversation discussing OMB's initial reaction to the proposed permitting standards is included in the Sealed Appendix. "OMB Review of Hazardous Waste Tank Proposal," SA-1. On the same day, Ms. Dudley also wrote a memorandum to Robert P. Bedell, the Deputy Administrator of OMB's Office of Information and Regulatory Affairs ("OIRA"), discussing her reaction to the proposed permitting standards. This memorandum is also included in the Sealed Appendix. "Hazardous Waste Tank Rule," SA-2. These memoranda clearly indicate that OMB staff wanted to require EPA to gather additional information prior to promulgating the proposed standards, that they knew that such a requirement could significantly delay promulgation of the regulations, and that they were aware that the Section 3004(w) standards were subject to a statutory deadline of March 1, 1985.

On April 10, 1985, Susan Dudley of OMB called William Kline, an environmental scientist managing EPA's contractual work on the permitting standards, EPA Response to Interrogatory #1, Attachment A, PA-2, to discuss the proposed tank regulations. EPA Response to Interrogatory #9 (Appendix 2 to Plaintiffs' Motion to Compel, at 10). A memorandum of April 10, 1985 describing this conversation is included in the Sealed Appendix. "OMB 'Ideas' on the Hazardous Waste Tank Rules," SA-3. This memorandum indicates that even though the proposed permitting standards had been at OMB for almost six weeks, EPA had not received any formal comments from OMB. Yet OMB staff were still considering regulatory approaches to the permitting standards that were radically different from EPA's proposal.

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[9] Mr. Lester is the EPA staff member responsible for overall management of the economic impact/cost analysis for the proposed permitting standards. EPA Response to Interrogatory #1, Attachment A, PA-4. Ms. Dudley is a senior economist in the Regulatory Analysis Branch of OMB's Office of Information and Regulatory Affairs. OMB Response to Interrogatory #1, Attachment 1, PA-5.

On April 12, 1985, Nancy Baldwin of OMB called Arline Sheehan, an assistant to John H. Skinner who was then the director of EPA's Office of Solid Waste. Two memoranda that describe this conversation are included in the Sealed Appendix. Document SA-4 is a copy of a handwritten memorandum from Dale Ruhter to John Lehman, director of OSW's Waste Management and Economics Division. (This document is listed as Document 8 of Attachment F to EPA's Response to Interrogatory #9, Appendix 2 to Plaintiffs' Motion to Compel). Document SA-5 is a copy of John Lehman's notes concerning the conversation. (This document is listed as Document 3 in Attachment F to EPA's Response to Interrogatory #9). These documents indicate that OMB staff had several serious problems with the proposed permitting standards and wanted to meet with EPA staff to "negotiate."

EPA staff met with OMB staff to discuss the tank permitting standards on April 16, 1985. EPA Response to Interrogatory #8, at 8; OMB Response to Interrogatory #5, Attachment 4; Defendants' Answer to Amended Complaint, Par. 25. Present at this meeting were three OMB staff (Susan Dudley, Nancy Baldwin, and Richard Brozen) and eight EPA staff (Harold Lester, William Kline, Penelope Hansen, John Lehman, Sam Napolitano, Meg Kelley, Mark Greenwood, and Louise Wise). EPA Response to Interrogatory #8, at 8; OMB Response to Interrogatory #5, Attachment 4. Notes John Lehman took at this meeting are included in the Sealed Appendix, SA-6, as is a memorandum to file from William Kline, SA-7. A memorandum dated April 16, 1985 from Susan Dudley to Jim Kamihachi, Branch Chief of Regulatory Policy at OIRA, which describes this meeting is SA-8; a "Note to Bob Bedell" dated April 19, 1985, from Nancy Baldwin and Susan Dudley, which also does so, is SA-9. These materials indicate that OMB asked EPA to make significant changes in the proposed permitting standards in four areas and that a heated discussion ensued. OMB sought to shift the basic philosophy or goal of the standards away from EPA's containment approach toward more risk-based standards.

EPA's "overall strategy for hazardous waste storage facilities is based on a policy decision that the best way to accomplish the statutory goal of protecting human health and the environment is to contain the waste for the term of storage." 50 Fed. Reg. 26446 (June 26, 1985). OMB disagreed with this approach because OMB believes that only leaks of hazardous waste that can be demonstrated by risk analysis to threaten harm to human health should be contained. At OMB's request, EPA agreed that "any place in the preamble [of the proposed tank regulations] where it was stated that the intent of these regulations is 'to prevent releases to the environment'" would be "changed to 'to protect human health and the environment.'" Memorandum from Penelope Hansen to Red Border Review Offices, May 7, 1985, Exhibit 25 to Skinner Deposition, PA-6, at 3. EPA also agreed, at OMB's request, to perform a risk assessment prior to final promulgation of the standards, and to solicit comments on "other regulatory alternatives" to secondary containment, which OMB opposes. Id., at 3, 2.

It was evident to EPA staff that OMB would not approve the proposed permitting standards unless EPA agreed to make changes in them. See Office of Solid Waste, Weekly Activities Report, April 18, 1985, at 3 (Exhibit A to Supplemental Declaration of Steven Neugeboren).[10]

On May 10, 1985, EPA submitted a revised version of the proposed permitting standards to OMB for its review. EPA Response to Interrogatory #6, Attachment C; OMB Response to Interrogatory #2, Attachment 2; Defendants' Answer to Amended Complaint, Par. 27. After reviewing the revised draft, OMB

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10. "OMB basically stated that we can propose the rules we have but must change the preamble to address variances, performance standards, risk-based standards, and numerous other options to increase the flexibility of the regulations."

staff felt that EPA had not gone nearly far enough in shifting the thrust of the proposal away from a containment approach toward risk-based standards. OMB's reaction to this revised draft is discussed in a memorandum from Susan Dudley to Bob Bedell dated May 17, 1985, which is included in the Sealed Appendix. "Hazardous Waste Tank Update," SA-10. This memorandum outlines with remarkable clarity how OMB used the Executive Order 12291 review process to change the substance of EPA regulations by withholding approval until EPA changed the proposal in accordance with OMB's wishes. It reflects OMB's dissatisfaction with the revisions made by EPA and the belief of OMB staff that they can require EPA to make further changes in the proposed rule because EPA is anxious to get it out.[11] It also reflects a disagreement between two offices within OMB concerning whether OMB should dictate changes or simply reject the proposed rule and require EPA to adopt an entirely new approach.

Internal disagreement within OMB continued and further delayed publication of the proposed standards, as reflected in the statements contained in the Weekly Activities Report of EPA's Office of Solid Waste for the Week Ending May 31, 1985, SA-11. On May 31, 1985 Ronald Cogswell, Deputy Associate Director of OMB's Natural Resources Division, sent a memorandum to Robert Bedell, which is included in the Sealed Appendix. "Hazardous Waste Tank Rule," SA-12. This memorandum indicates that OMB officials conditioned clearance of the rule under Executive Order 12291 on EPA's agreement to make substantive changes in it. It also reflects OMB's acute awareness that statutory deadlines may undercut OMB's ability to dictate the substance of EPA rules and a belief that OMB should resist this by interpreting such deadlines as narrowly as possible. The memorandum indicates that OMB staff viewed the tank standards as an important precedent for OMB review of other RCRA regulations mandated by the 1984 Amendments.

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[11] Remarkably, it also reflects the belief of OMB staff that OMB's changes in the proposed rule should not be transmitted to EPA in writing because of fear that the Environmental Defense Fund will file this lawsuit.

Only after this lawsuit was filed on May 30, 1985, did OMB staff again meet with EPA staff to discuss the proposed permitting standards. On June 4, 1985, OMB staff met with EPA staff to discuss the proposed tank standards. EPA Response to Interrogatory #8, at 9; OMB Response to Interrogatory #5, Attachment 4. The notes of John Lehman concerning this meeting are attached as SA-13. They indicate that OMB staff sought to dictate a host of specific changes in the permitting standards and referred to them as "fixes needed for clearance". They also indicate that an entirely new issue (involving standards for small quantity generator tanks) was raised for the first time by OMB, three months after the proposed standards had been submitted to OMB for review. EPA agreed to submit written revisions to the permitting standards to OMB by June 6.

On June 5, EPA submitted to OMB a series of handwritten changes to the permitting standards to incorporate OMB's requests. A copy of these changes is contained in the Sealed Appendix. SA-14. OMB then requested even further revisions. A handwritten note from Arline Sheehan to John Skinner dated June 6, indicates that "OMB has concurred on the revised tank package provided you agree to the following attached changes." The note suggests that the rule be retyped and sent "back to OMB by Monday morning for Bedell's signature." SA-15. EPA adopted OMB's changes, as indicated by the June 11 cover memo from Richard Brozen to David Gibbons and Donald Crabill that accompanied the revised draft of the standards. "Clearance for EPA's Hazardous Tank Rule," SA-16.

OMB completed its review and cleared the proposed permitting standards on

June 12, 1985. OMB Response to Interrogatory #3, at 3. Clearance from OMB was obtained only after Donald Crabill, Susan Dudley, Richard Brozen, Donald Arbuckle, Gail Coad, and Robert Bedell concurred as reflected by their signatures on OMB's Regulatory Docket Worksheet, SA-17. The worksheet also indicates that OMB treated the permitting standards as a "Standard" submission, rather than a submission subject to "Statutory or Judicial Deadline" and that it was cleared as "Consistent with the Executive Order with Change," rather than as a "Statutory or Judicial Deadline Case." SA-17, at 2.

Following OMB clearance, the proposed permitting standards were submitted to the EPA Administrator who signed them on June 14, 1985. OSW Weekly Activities Reports, June 13 & 20, 1985, SA-18; SA-19. The proposed standards were published in the Federal Register on June 26, 1985, 50 Fed. Reg. 26444, after OMB cleared last-minute stylistic changes suggested by EPA staff on June 17. See Notes of Susan Dudley, SA-20.

ARGUMENT

I. OMB HAS NO AUTHORITY TO DELAY EPA'S PROMULGATION OF REGULATIONS BEYOND THE DEADLINE SPECIFIED BY STATUTE.

A. Executive Order 12291 Does Not Authorize OMB to Delay EPA's Promulgation of Regulations Beyond Statutory Deadlines.

OMB has no authority under Executive Order 12291, or under any other provision of law, to delay EPA's promulgation of regulations beyond deadlines specified by Congress. Executive Order 12291 grants OMB review authority only "to the extent permitted by law," Executive Order 12291, Secs. 2, 3(a) & 6(a), and the subsection of the order governing OMB's regulatory review specifies that "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law." Executive Order 12291, Sec. 3(f)(3). Section 8(a)(2) of the executive order expressly exempts from OMB review "[a]ny regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute . . .".

In fact, OMB officials have acknowledged that Executive Order 12291 does not authorize OMB to review regulations when such review would conflict with a statutory deadline. Defendant James C. Miller III, the new Director of OMB, stated so explicitly when he served as Administrator of OMB's Office of Information and Regulatory Affairs (OIRA), the branch of OMB responsible for regulatory review under the executive order. Shortly after Executive Order 12291 was issued, Mr. Miller appeared before a congressional committee investigating the "Role of OMB in Regulation" and stressed the importance of construing narrowly the authority granted to OMB by Executive Order 12291.

> "President Reagan's Executive order imposes requirements on the agencies only 'to the extent permitted by law' and only to the extent that its terms would not 'conflict with deadlines imposed by statute or by judicial order.' The limited application of [Executive Order 12291] is a crucial point, one that insures [its] legality and the legality of actions pursuant to [it]. . . If a statute or a court order establishes a date for a rulemaking action, then Executive Order 12291 cannot delay that action. In other words, if Congress or the courts have spoken on the matter, then the Executive order process will conform to that expression, not contradict it."[12]

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12. Testimony of James C. Miller III, in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigation of House Comm. on Energy & Commerce, 97th Cong., 1st Sess. (1981), at 46 (emphasis supplied), PA-7., Mr. Miller expressed the same view in an interview in the March/April 1981 issue of Regulation. When asked by Antonin Scalia whether the procedures of Executive Order 12291 would add several months to the time it takes to issue regulations, Mr. Miller responded: "Regardless, we think the time is necessary - and well worth it - to make sure that new rules do more good than harm. Moreover, remember that the procedures of the executive order do not apply to emergency rules or rules subject to legislative or court-ordered deadlines - and also that OMB may waive the procedures for any rule. With these safeguards, we think the requirements for thorough deliberation - even if it takes 210 days - are all to the good." "Deregulation HQ: An Interview on the New Executive Order with Murray L. Weidenbaum and James C. Miller III," Regulation, March/April 1981, at 17 (emphasis supplied), PA-8.

In its first report on progress in implementing Executive Order 12291, "The First 100 Days of E.O. 12291," OMB also acknowledged that the executive order did not authorize it to review regulations subject to statutory deadlines. "Emergency regulations or those with statutory deadlines" were listed separately in this report with a note explaning that "[t]hese regulations are submitted to, but not reviewed by, OMB under the terms of E.O. 12291." OMB, "The First 100 Days of E.O. 12291, 'Federal Regulation'," PA-9, at 316.

Similarly, the Justice Department has emphasized that it is essential to construe the authority granted OMB by Executive Order 12291 narrowly in order for the executive order to survive legal challenge. In its opinion upholding the legality of the executive order, the Justice Department stressed the following "basic precept":

> "[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." U.S. Department of Justice, Office of Legal Counsel, "Proposed Executive Order entitled 'Federal Regulation'," Feb. 13, 1981, at 3 (A copy of this opinion, reprinted in Role of OMB in Regulation, supra, is attached as PA-10).

Accordingly, Executive Branch officials have acknowledged that for Executive Order 12291 to be legally valid, it cannot be interpreted to authorize OMB to delay promulgation of regulations beyond statutory deadlines.

This Court also has expressed the view that regulations are exempt from OMB review under Executive Order 12291 when such review would conflict with a statutory deadline. In NRDC v. Gorsuch, Nos. 2153-73 et al. (D.D.C. Aug. 25, 1982), this Court required EPA to develop a schedule for issuing regulations subject to statutory deadlines in the Clean Water Act that would include no time for OMB review under Executive Order 12291. The Court stated that the regulations "appear, in any event, to be exempted from the strictures of Executive Order 12291. See Executive Order 12291, Section 8(a)(2), 46 Fed. Reg. 13193, 13198 (Feb. 19, 1981) (E.O. 12291 procedures inapplicable if application of same would conflict with statutory or judicial deadlines)." In a subsequent case involving a statutory deadline in the Clean Air Act for EPA's promulgation of nitrogen oxide and particulate emission standards for heavy duty vehicles, Judge Pratt of this Court held that "OMB review is not only unnecessary, but in contravention to applicable law. See Exec. Order 12291, Sec. 8(a)(2), 46 Fed. Reg. 13193, 13198 (Feb. 19, 1981)." NRDC v. Ruckelshaus, No. 84-758 (D.D.C. Sept. 14, 1984), 14 ELR 20817, 20819. (A copy of the decision in this case is attached as PA-11). Thus, he declared that "OMB review can, as noted previously, be eliminated entirely." Id.[13]/

Thus it is apparent from the plain language of Executive Order 12291, as recognized by this Court, the Justice Department, and OMB itself, that OMB has no authority under the executive order to delay promulgation of regulations beyond statutory deadlines.

B. OMB Has No Authority to Contravene the Commands of Congress.

As noted above, the President has not authorized OMB under Executive Order 12291 to delay promulgation of regulations beyond statutory deadlines; nor could he under the powers granted him by Article II of the Constitution.

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13. See also Center for Science in the Public Interest v. Department of the Treasury, 573 F. Supp. 1168 (D.D.C. 1983), app. dismissed, 727 F.2d 1161 (D.C. Cir. 1984) ("the broad thrust of Executive Order No. 12,291 provides an insufficient basis for the defendants to disregard their statutory duties.").

As the Justice Department acknowledged in its opinion in support of the executive order, the President's exercise of his Article II powers "must conform to legislation enacted by Congress." Thus, the President may not "require or permit agencies to transgress boundaries set by Congress." U.S. Department of Justice, Office of Legal Counsel, Memorandum, supra, at 3. (PA-10). This principle is fundamental to a system of government based on a constitutional division of powers between three branches of government.

The Supreme Court recognized the importance of this principle in the steel seizure case where it struck down the President's executive order directing the Secretary of Commerce to take possession of the nation's steel mills to ensure their continued operation during a wartime strike. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The Court noted that the "President's power, if any, to issue the order must stem either from an Act of Congress or from the Constitution itself." 343 U.S., at 585. The Court held that the steel seizure order could not be upheld as a valid exercise of the President's Article II powers to "take Care that the Laws be faithfully executed" because the "President's order does not direct that a congressional policy be executed in a manner prescribed by Congress - it directs that a presidential policy be executed in a manner prescribed by the President." 343 U.S., at 588.

In a concurring opinion, Justice Jackson noted that:

> "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S., at 637-638 (Jackson, J., concurring).

When Congress establishes a statutory deadline for agency action, it expresses its will in specific terms that attach special urgency to the action it requires. Action to delay an agency from acting beyond the date of a statutory deadline is incompatible with the will of Congress. Such action cannot be sustained as a valid exercise of the President's Article II powers because rather than ensuring that the law be faithfully executed, it frustrates the intent of Congress. As the Supreme Court stated in Kendall v. United States, 37 U.S. (12 Pet.) 524, 613 (1838), "[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution is a novel construction of the constitution, and entirely inadmissible." Thus, the President has not, and could not, authorize OMB to delay EPA's promulgation of regulations beyond the date of a statutory deadline.

OMB also has no authority to require an agency to conform to its views, as defendants have conceded.[14] The Justice Department's opinion concerning the executive order stresses that OMB's authority under the executive order is limited to performing an "advisory and consultative" role that does not authorize OMB to displace decisionmaking functions delegated to agencies by law. Id., at 7.[15]

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[14] See D.S.J. Reply, at 9 ("OMB has no authority to require an agency to conform to its views. The President has directed agencies only to respond to OMB's views, not to conform to them" (footnote omitted)).

[15] Dept. of Justice, Office of Legal Counsel, Memorandum, supra, at 4 ("Congress may constitutionally conclude that some statutory responsibilities should be carried out by particular officers without the President's revision,

(cont'd on next page)

Thus OMB may not delay promulgation of EPA regulations beyond a statutory deadline in order to dictate the substance of them for such action would conflict not only with the statutory deadline but also with Congress' delegation of decisionmaking functions to EPA. Yet this is precisely what occurred with the proposed permitting standards.

II. OMB'S REVIEW DELAYED EPA'S PROMULGATION OF THE SECTION 3004(w) REGULATIONS BEYOND THE STATUTORY DEADLINE.

It is undisputed in this case that, despite the statutory deadline, OMB reviewed EPA's proposed Section 3004(w) standards under Executive Order 12291 and that OMB's review delayed promulgation of the standards beyond the statutory deadline.

A. OMB Reviewed the Proposed Section 3004(w) Standards under Executive Order 12291, Ignoring the 8(a)(2) Exemption.

Even though Section 8(a)(2) of Executive Order 12291 exempts from OMB review regulations for which such review "would conflict with deadlines imposed by statute," defendants have admitted that EPA's proposed Section 3004(w) standards were submitted to OMB for review under the executive order on March 1, 1985. Defendants' Answer to Amended Complaint, Par. 22; EPA's Response to Plaintiffs' Interrogatory #6. EPA's submission to OMB clearly identified the permitting standards as subject to a statutory deadline. OMB Form 83, Request for OMB Review, PA-1.

OMB staff were acutely aware that the permitting standards were subject to a statutory deadline that already had expired. Shortly after the proposed

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because such officers head agencies having the technical expertise and institutional competence that Congress intended the ultimate decisionmaker to possess."); see also Myers v. United States, 272 U.S. 52, 135 (1926) ("Of course there may be duties so peculiary and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance.").

standards were submitted to OMB, Susan Dudley of OMB wrote a memorandum to Robert Bedell highlighting the statutory deadline and the fact that the changes OMB sought to require EPA to make would cause even further delays beyond the March 1, 1985 deadline and might result in a lawsuit by EDF. "Hazardous Waste Tank Rule," Memorandum from Susan Dudley to Bob Bedell, March 25, 1985, SA-2.

Despite their awareness of the deadline and the further delays OMB review would generate, OMB made no pretense of honoring the Section 8(a)(2) exemption. Instead, OMB treated the proposed permitting standards as a standard case of OMB review under Executive Order 12291. This is evident from OMB's completed "Regulatory Docket Worksheet" for the proposed permitting standards. Regulatory Docket Worksheet, SA-17. Under "Type of Submission," OMB lists the permitting standards as a "Standard" submission rather than a submission subject to a "Statutory or Judicial Deadline." _Id_., at 2. Under "Type of Review," rather than listing the proposed permitting standards as a "Statutory or Judicial Deadline Case," OMB has them listed as "Consistent with E.O. With Change." _Id_. See also 50 _Fed_. _Reg_. 26494 (June 26, 1985).

Thus, despite Director Miller's previous statements that "the procedures of the executive order do not apply to emergency rules or rules subject to legislative or court-ordered deadlines," _Regulation_, March/April 1981, at 17, PA-8, OMB ignored the Section 8(a)(2) exemption for the proposed permitting standards.

B. _Even Though the Statutory Deadline Had Expired, OMB Extended its Review of the Proposed Section 3004(w) Standards_.

OMB did more than simply subject the proposed permitting standards to review under Executive Order 12291. Because OMB disagreed with the approach EPA had adopted to the proposed standards, it refused to clear them until EPA agreed to make substantial changes in them.

When he submitted the proposed standards to OMB for review, John Skinner, who was then director of EPA's Office of Solid Waste, anticipated that OMB would have only the ten-day review period allowed by the executive order for review of nonmajor, proposed rules. Skinner Deposition, at 104, 105. Although EPA staff responded promptly to OMB's requests for additional information about the proposal,[16] OMB extended its review of the proposed permitting standards pursuant to Section 3(f)(1) of Executive Order 12291, which directs the agency to "refrain from publishing . . . its notice of proposed rulemaking until such review is concluded." A letter from Gail B. Coad of OMB formally notified EPA of this extension on March 25, 1985. Coad Letter, Exhibit 24 to Skinner Deposition, PA-3; see also Skinner Deposition, at 108-111.

Under the terms of Section 3(f)(1) of Executive Order 12291, once an agency has been notified that OMB has extended its review of a proposed rule, it may not publish that proposal in the Federal Register until OMB has completed its review. Dr. Skinner clearly understood this. During his deposition Dr. Skinner stated that the consequence of OMB extending review was "[t]hat I did not have the authority to cause the regulation to be promulgated until the review was completed." Skinner Deposition, at 111. When asked if this also meant that he did not have the authority to cause a proposed regulation to be published, he answered affirmatively. Id.

Dr. Skinner also understood that once OMB had extended its review of a proposed regulation under Executive Order 12291 there is no limit on the length of time OMB's review may take. Skinner Deposition, at 112-113. He testified that he knew of no instance in which the Office of Solid Waste or any other division of EPA had ever published any proposed or final rules subject to extended review without first obtaining clearance from OMB. Skinner Deposition, at 114-115. Thus, by notifying EPA that it was extending its review under Executive Order 12291, OMB directed EPA not to publish the proposed permitting standards until OMB's review was completed, despite expiration of the statutory deadline.

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[16] See EPA Response to Interrogatory #5, Attachment C, at 2-3, 5-7.

OMB extended its review of the proposed permitting standards not simply to give it more time to prepare its views, but also to ensure that its views were adopted by EPA. For almost six weeks after EPA had submitted the permitting standards to OMB for review, EPA did not receive any comments from OMB. Memorandum from Penelope Hansen to John P. Lehman, April 10, 1985, SA-3. OMB then met with EPA staff and insisted that significant changes be made in the proposal. As OMB staff recognized, these changes were interpreted by EPA staff as a fundamental assault on EPA's long-established containment philosophy for regulating hazardous waste to prevent contamination of the environment before it occurred. Memorandum from Susan Dudley to Jim Kamihachi, April 16, 1985, SA-8, at 2. OMB sought to require EPA to base regulations on a risk-based approach that would vary standards to prevent only releases of hazardous waste that could be shown by risk analysis to harm human health, an approach EPA previously had rejected as too difficult to implement. See Declaration of Steven Neugeboren, at 5-10.

Extended review continued long after OMB had expressed its views on the proposed permitting standards to EPA. OMB refused to complete its review until it was satisfied that all the changes it sought had been made in EPA's proposal, a revised version of which was submitted to OMB on May 10, 1985. The revised draft, however, still was not satisfactory to OMB. Memorandum from Susan Dudley to Bob Bedell, May 17, 1985, SA-10, at 2. OMB staff even considered rejecting the entire proposal, but eventually decided instead to dictate further changes.

Only after this lawsuit was filed, did OMB staff meet with EPA staff to dictate the "fixes needed for clearance". Notes of John Lehman on June 4, 1985 Meeting with OMB, SA-13. Because OMB distrusted EPA and felt that "close supervision" was needed, SA-10, at 3, OMB carefully scrutinized the language of every portion of the proposal. Handwritten revisions the proposal were submitted to OMB by EPA for clearance. SA-14. Thus, far from performing the simple "advisory and consultative" role contemplated by the Justice Department when it approved Executive Order 12291, PA-10, at 7, OMB used extended review as a vehicle to enable it to dictate the substance of EPA regulations.

C. OMB's Review Delayed Promulgation of the Section 3004(w) Standards Beyond the Statutory Deadline.

OMB review of the proposed permitting standards delayed their promulgation for several months beyond the statutory deadline. When the proposed permitting standards were submitted to OMB for review on March 1, 1985, EPA planned to publish them in the Federal Register by March 31, 1985, and to promulgate the final regulations by March 31, 1986. Office of Solid Waste Weekly Activities Report, March 7, 1985, p. 3, PA-12.

The delay caused by OMB's extended review of the proposed permitting standards is reflected in the reports of EPA's computerized Action Tracking System (ATS), which records EPA's progress in meeting milestones for regulatory actions. A copy of the ATS summaries for the tank standards, is attached as SA-21. The ATS summary for the period 3/23/85-4/5/85 indicates that the notice of proposed rulemaking (NPRM) had been submitted to OMB as scheduled on March 1, 1985, and was scheduled for publication in the Federal Register by March 31, 1985. The ATS summary for the next period indicates that if OMB had released the NPRM as scheduled, it would have been published in the Federal Register by March 31, 1985. The ATS summaries for the following periods indicate that publication of the NPRM was delayed by OMB, and that the NPRM was finally released by OMB nearly three months late, causing slippage in the date of publication in the Federal Register.

Further confirmation that OMB review has delayed promulgation of the permitting standards is provided by the Weekly Activities Reports of EPA's Office of Solid Waste. (Copies of these reports previously have been submitted to the Court as Exhibit A to the Supplemental Affidavit of Steven Neugeboren). During his deposition, John Skinner confirmed not only the authenticity of the reports submitted by plaintiffs, Skinner Deposition, at 20, but also the accuracy of the statements contained therein. Dr. Skinner testified that the statements contained in paragraphs 6 through 11 of the Declaration of Steven Neugeboren are true and accurate statements with respect to the contents of the Weekly Activities Reports and that the statements in those reports also are true and accurate. Skinner Deposition, at 20-23. Thus, he confirmed the accuracy of statements in the reports dated April 4, 11, and 25 that because of delays in obtaining OMB approval for the proposed standards, EPA's schedule slipped. Dr. Skinner also confirmed that OMB insisted that EPA revise the proposal to address "variances, performance standards, risk-based standards and numerous other options" and that a revised rule was submitted to OMB on May 20, 1985. Declaration of Steven Neugeboren, Para. 8, 10 & 11; Skinner Deposition, at 24-25. The Weekly Activities Reports for June 13 & 20 confirm further schedule slippage due to OMB. Id-16, 6a-16.

III. UNLESS THIS COURT GRANTS PLAINTIFFS RELIEF, OMB WILL CONTINUE TO DELAY EPA'S PROMULGATION OF REGULATIONS BEYOND THE DEADLINES SPECIFIED IN HSWA.

Despite OMB's initial assurances to Congress and the public that Executive Order 12291 would not be used to delay regulations subject to statutory deadlines, OMB now ignores entirely the exemption in Section 8(a)(2) of the executive order. OMB routinely reviews EPA regulations subject to statutory deadlines even if such review will delay promulgation beyond the deadline. Unless this Court declares that OMB has no authority to delay promulgation of regulations beyond statutory deadlines, OMB will continue to do so both for the Section 3004(o) standards and for other RCRA regulations subject to statutory deadlines in the 1984 Amendments.

4. OMB Ignores the Exemption in Section 8(a)(2) of Executive Order 12291 and Routinely Delays EPA's Promulgation of Regulations Subject to Statutory Deadlines.

Section 8(a)(2) of Executive Order 12291, which exempts from OMB review regulations for which such review would conflict with a statutory or judicial deadline, establishes a procedure to be followed when OMB review would conflict with a statutory or judicial deadline. The executive order provides that:

> "[A]ny such regulation shall be reported to the Director [of OMB] together with a brief explanation of the conflict, the agency shall publish in the Federal Register a statement of the reasons why it is impracticable for the agency to follow the procedures of this Order with respect to such a rule, and the agency, in consultation with the Director, shall adhere to the requirements of this Order to the extent permitted by statutory or judicial deadlines." E.O. 12291, Sec. 8(a)(2).

This procedure, however, is not followed by OMB, which routinely subjects EPA regulations to review under Executive Order 12291 regardless of the impact on EPA's ability to meet statutory deadlines. In response to an interrogatory, EPA identified 169 regulations subject to statutory or judicial deadlines that it has submitted to OMB for review under Executive Order 12291. EPA Response to Interrogatory #15, Attachment A. (A copy of this list is attached as Ex. 13. While this was only a partial list, because it omits Noise Control Act regulations, it indicates the extent to which OMB has ignored the rogatory #12, CAA, at 5-6.[17]

ved EPA's promulgation of regulations under the Clean Water
ace of judicial deadlines. For seven Clean Water Act
tted to OMB for review prior to the judicial deadline
uring, inorganic chemicals (Phase II), nonferrous
ase I and Phase II), nonferrous metals forming,
and plastics molding and forming (Phase I), OMB review
he deadline. PA-13; EPA's Response to Interrogatory #12. Six
egulations were submitted to OMB for review after a statutory
ine had expired (foundries, inorganic chemicals (Phase I),
ffshore oil and gas extraction, placer mining, and the Idaho
ndards), yet OMB still extended its review of four of them
s and offshore oil and gas). Id.

y, OMB extended its review of regulations required by the
er Act for nearly five months, even though the deadline for
had expired. PA-19; PA-13: EPA Response to Interrogatory

ity to "extend review" under Executive Order 12291 has
hat EPA now keeps a running tally of the number of its
s under extended review by OMB and the resulting delays.
ocumented in the Weekly OMB Status Reports," PA-16. As
for example, 24 EPA regulations were under extended review
age delay per regulation was 91 days; total delays were 2,180

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ion of OMB's review of these regulations see Olson, "The
ker: Office of Management & Budget Supervision of
tection Agency Rulemaking Under Executive Order 12,291," 4
es. L. 1, 68 n.352 (1984). OMB extended its review
st the statutory deadline because OMB disagreed with the
ch adopted by EPA. Id., at 68-69. See also Testimony of
A-14, at 82-83.

days, or more than 311 weeks. Id.

Both OMB and EPA concede that they have no formal policies or procedures governing the circumstances under which Section 8(a)(2) is to be used to prevent OMB review from delaying promulgation of EPA regulations beyond a statutory deadline. John Skinner confirmed that EPA staff has "had discussions" of the issue, but that there was no formal guidance on the question from either EPA's Office of General Counsel or from OMB. Skinner Deposition, 125-127. In response to an interrogatory, OMB was unable to identify any memoranda or other documents "discussing the circumstances under which the exemption in Section 8(a)(2) of Executive Order 12291 should be utilized for any proposed or final regulation." OMB's Response to Interrogatory #13. Similarly, EPA identified only one document discussing Section 8(a)(2), and it concerned its applicability to a particular regulation. The only apparent policy now in effect is to ignore Section 8(a)(2).[18]

During discovery, plaintiffs asked both OMB and EPA to list any "proposed or final EPA regulations for which the exemption in Section 8(a)(2) of Executive Order 12291 was invoked, the reasons the exemption was invoked, the date it was invoked, and the date of publication of the proposed or final regulations." Plaintiffs' Interrogatories #10(c) & 11 to OMB; Plaintiffs; Interrogatories #12(b) & 13 to EPA. In response, both OMB and EPA stated "[n]either EPA nor OMB 'invoke' Section 8(a)(2) of Executive Order 12291 as a

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18. In fact, OMB apparently has no way of identifying regulations subject to statutory or judicial deadlines in their computer tracking system. When plaintiffs asked them to supply certain information about regulations EPA had identified as subject to statutory or judicial deadlines, OMB responded that "[w]hile OMB does maintain a data base for all of EPA's rules, including virtually all the information requested by Plaintiffs, it does not keep the data in a way that allows computer segregation of the rules contained in Attachment G [listing regulations subject to statutory or judicial deadlines] from all the remaining EPA rules." OMB Response to Interrogatory #10.

bar to compliance because the Executive Order directs agencies to comply with its procedural requirements to 'the extent permitted by [the] statutory or judicial deadlines.' EO 12291 at Sec. 8(a)(2)." OMB Response to Interrogatories #10(c) & 11; EPA Response to Interrogatories #12(b) & 13.

These responses, while clearly evasive since the interrogatory did not ask whether 8(a)(2) was invoked "as a bar to compliance," reflect the fact that OMB and EPA simply ignore the procedures of Section 8(a)(2) and thus have no occasion to invoke it. Conflict between OMB review and a statutory deadline is never acknowledged in the Federal Register as contemplated by Section 8(a)(2) and OMB review is not bypassed when necessary to avoid delay beyond the date of a statutory deadline. This is reflected in OMB's annual reports summarizing its actions under Executive Order 12291. Each annual report lists by agency the number of regulations "not reviewed because they were exempt from the Order, had been improperly submitted, or were subject to statutory or judicial deadlines." OMB, "Executive Order 12291 on Federal Regulation: Progress During 1982," at 11 (April, 1981). (A copy of the relevant portion of this report is included in the Public Appendix as PA-17).[19] Table 1 compares the number of proposed or final EPA regulations reviewed by OMB under the executive order each year with the number listed in the category "Emergency, Statutory or Judicial Deadline" in each annual report.

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19. The annual report for 1982 refers to these as "rules issued under Section 8 of the Executive Order due to emergencies, judicial or statutory deadlines." OMB, "Executive Order 12291 on Federal Regulation: Progress During 1982," at 9 (April 1983), PA-18. Relevant portions of the annual reports for 1983 and 1984 are included in the Public Appendix as PA-19 & PA-20.

TABLE 1

Year	EPA Regulations Reviewed by OMB under EO 12291	Emergency, Statutory or Judicial Deadline
1981	734	1
1982	340	2
1983	268	2
1984	302	0
Totals (1981-1984)	1644	5

SOURCE: OMB Annual Reports, PA-17, 18, 19, 20.

As Table 1 indicates, there have only been five instances - and none since 1983 - in which OMB has even acknowledged that its review of EPA regulations has been affected by a statutory or judicial deadline. In at least one of these instances, OMB reviewed the regulations and declined to approve them but they were issued by EPA to comply with a court order. This provoked an angry reaction and threats from OMB. See Testimony of John E. Daniel, former EPA Chief of Staff, in EPA: Investigation of Superfund and Agency Abuses, Hearings before Subcomm. on Oversight and Investigations of the House Energy & Commerce Comm., 98th Cong., 1st Sess., Sept. 27, 1983, at 7-8.[20]

The fact that Section 8 of the executive order has been utilized in only five instances reflects OMB's insistence on reviewing EPA regulations even in the face of a conflicting statutory deadline.

20."On one occasion, Mr. Gore, I was a participant with the Administrator in issuing some regulations over OMB's objections. These were regulations that had been ordered by court. The Agency - the Administrator was under court order to issue by a certain deadline. When they had not received the requisite OMB approval under the executive order, she nonetheless signed the regulations and issued them. Late that evening I received a call from an OMB official in which . . .he said to me words to this effect that there was a price to pay for doing what we had done, and that we hadn't begun to pay." A copy of this testimony is attached as PA-14.

B. OMB Will Continue to Delay EPA's Promulgation of the Section 3004(w) Standards.

Unless this Court declares that OMB has no authority to further delay promulgation of the permitting standards required by Section 3004(w) of RCRA, OMB will continue to delay their promulgation. Defendants maintain that OMB review will not delay the final permitting standards because "OMB's review of the regulation will be concurrent with internal EPA reviews, and the schedule thus allows no additional time for OMB review." D.S.J. Mem., at 6. The fallacy in defendants' assertion is manifest from the fact that the proposed regulation also was subjected to concurrent OMB/Red Border review. OMB was given the same amount of time allotted to EPA for Red Border review of the proposed regulations, and yet OMB was able to delay publication of the proposal for several months by extending its review and by refusing to clear the proposed standards until the changes it sought had been adopted by EPA.

Defendants have not proposed any limitation on OMB's ability to extend review or to insist that EPA make changes in the substance of the final regulations. Defendants would like the Court to believe that OMB simply will not do so. Yet during Dr. Skinner's deposition, when plaintiffs sought to explore the parameters of the supposed "understanding" between EPA and OMB with respect to review of the final regulation, it became evident that they have no such commitment from OMB. Dr. Skinner testified that on the day his declaration was filed, EPA's General Counsel, Francis Blake, reached an oral understanding with an unnamed assistant general counsel at OMB that OMB will be given no more time to review the final rule than is allowed EPA for Red Border Review. Skinner Deposition, at 72-73. Dr. Skinner was instructed not to answer whether OMB review could take longer than ten days, Skinner Deposition, at 78, whether EPA would be authorized to promulgate the final rule upon completion of the ten-day period, Skinner Deposition, at 82, or whether OMB could insist that changes be made by EPA in the final rule as a condition for its concurrence. Skinner Deposition, at 83, 84. Dr. Skinner did state, however, that among the events outside of EPA's control that could require delays in the June 30, 1986 promulgation date were actions by OMB because EPA has "no control over OMB's actions." Skinner Deposition, at 86-88.

So long as OMB retains the right to review and to approve the final regulations, OMB review will add additional time to promulgation of them. Concurrent review does not eliminate the need for EPA to take time to address whatever concerns are raised by OMB, or for OMB to review whatever changes EPA suggests as a result of Red Border review. Any changes sought by OMB must be submitted to EPA's Red Border reviewers, as occurred with the proposed rule, see Memorandum from Penelope Hansen to Red Border Review Offices, May 7, 1985, PA-6, and any Red Border revisions must in turn be submitted to OMB. See EPA ATS Report, SA-22.

Defendants are likely to argue that if a court order is entered against EPA, the delays caused by OMB during concurrent review of the proposed standards will not be repeated. However, if a court order is directed only against EPA, it actually will increase OMB's ability to insist on changes in the final regulations that EPA must agree to adopt in order to comply with the deadline in the court's order. In effect, this is precisely what happened with the proposed regulation. EPA was then under a legal obligation to meet a statutory deadline and OMB was able to force EPA to change the proposal because EPA was anxious to publish the proposed regulation in the face of the statutory deadline. Thus, it is essential that any court order limit OMB's ability to delay publication of the final regulations.

In fact, OMB has not hesitated in the past to extend its review of final regulations subject to court-ordered deadlines. In NRDC v. Gorsuch, Civil Action Nos. 2153-73 et al. (D.D.C. May 7, 1982), the case on which defendants rely, this Court issued an order requiring EPA to develop a schedule for proposing and promulgating regulations under the Clean Water Act that "shall contain no time (beyond that required by Agency reviews . . .) for reviews of any proposals or promulgations of regulations by the Office of Management and Budget under Executive Order 12291," id., at 3. However, after this Court issued an order adopting such a schedule on August 25, 1982, OMB subsequently extended its review under the executive order of six of the regulations subject to these deadlines (battery manufacturing, electric and electronic components, metal finishing, nonferrous metals, pesticides, and plastics molding and forming), thus delaying EPA's promulgation of them. EPA Response to Interrogatory #12, Attachment A.

Because OMB has no authority to delay regulations in order to review them under Executive Order 12291 after statutory deadlines have expired, it would be anomalous to authorize such actions by OMB in court-ordered relief. This would simply create an incentive for OMB to delay publication of regulations it disagrees with until after a deadline has passed and a deadline suit is brought.

C. OMB Is Likely to Delay EPA's Promulgation of Other RCRA Regulations Beyond the Statutory Deadlines.

As noted in the Declaration of John Skinner, the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98-616 (Nov. 8, 1984) added at least 44 new deadlines to RCRA, 29 of which must be satisfied within the next 20 months. Declaration of John H. Skinner, Par. 4. EPA already has identified significant regulations for which it is unlikely to meet the statutory deadline. In a letter of August 19, 1985 to Senator Robert Stafford, J. Winston Porter, EPA's Assistant Administrator for Solid Waste and Emergency Response, listed four deadlines that already have been missed and "several regulations, guidelines and listings, which the 1984 RCRA Amendments require to be completed in the next 6 to 12 months, [that] are not likely to be issued on time." Exhibit 22 to Skinner Deposition, at 3-4, PA-21. Dr. Skinner confirmed that the late promulgation schedules EPA has developed for each of these regulations included time for OMB review of both the proposed and final regulations. Skinner Deposition, at 96. Thus, OMB and EPA intend to continue to ignore the Section 8(a)(2) exemption and to permit OMB to review under Executive Order 12291 regulations subject to statutory deadlines even after the deadlines have expired.

It is likely that OMB review of these regulations will produce substantial delays, as occurred with the permitting standards for hazardous waste in tanks. OMB strongly disagrees with EPA's approach to regulation of hazardous waste and questions the philosophy of the RCRA program. The tanks proposal is frequently cited by OMB as an example of generic problems with EPA's RCRA program. See SA-23 and Declaration and Claim of Privilege of James C. Miller III (accompanying Defendants' Motion for Protective Order at 5, and Appendix A). OMB delayed the proposed tank standards in part because it viewed them as a precedent for other RCRA regulatory decisions to be made in the future. OMB has indicated that it will use the extended review procedures of Executive Order 12291 to delay indefinitely proposals that it disagrees with, regardless of statutory deadlines. SA-12.

OMB already has extended its review of the vast majority of RCRA regulations submitted to it under Executive Order 12291 since September 1984, as indicated in PA-22, a computer printout from OMB's Regulations Tracking System for EPA Regulations. The regulations marked with a "Y" in the printout are regulations for which OMB extended review. OMB has extended its review of 38 of the 50 RCRA and CERCLA regulations submitted to it by EPA for review between September 1984 and September 1985. In the absence of any limitation on OMB's ability to extend review, OMB effectively can contravene the will of Congress by refusing to approve any regulation with which it disagrees. Thus, OMB uses its ability to delay regulations in order to accomplish the very end the Executive Order expressly disavows: to "displac[e] the agencies' responsibilities delegated by law." Executive Order 12291, Sec. 3(f)(3).

IV. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AND DEFENDANTS ARE NOT.

Now that plaintiffs have completed discovery, it is apparent that there are no genuine issues of material fact and that plaintiffs are entitled to judgment as a matter of law. Thus summary judgment should be entered in plaintiffs' favor. Defendants' motion for summary judgment already has been briefed. Plaintiffs need not repeat the arguments made in their previous briefs, but in accordance with the Court's order of November 18 will supplement their opposition to defendants' motion for summary judgment.

A. Plaintiffs Are Entitled to Judgment as a Matter of Law and Defendants Are Not.

Plaintiffs are entitled to judgment as a matter of law because it is undisputed that EPA has failed to comply with Section 3004(w) of RCRA and that OMB has acted, and will continue to act, in excess of its jurisdiction and authority to delay EPA's promulgation of regulations beyond the deadlines established in RCRA. In the various briefs filed in this case, defendants have never been able to articulate any legal grounds for OMB authority to delay EPA's promulgation of regulations beyond statutory deadlines. Defendants instead have sought to divert attention from OMB's actions by consenting to a judgment against EPA that would only exacerbate OMB's unlawful actions and by attempting to prevent plaintiffs from discovering the true nature of OMB's actions. The facts are now before the Court and plaintiffs clearly are entitled to judgment in their favor.

Even if the Court disagreed with plaintiffs about the appropriate scope of relief, under no circumstances are defendants entitled to summary judgment because they have no legal claim to judgment as a matter of law. The judgment defendants seek - an order directing EPA to promulgate the regulations required by Section 3004(w) by June 30, 1986 - would be a judgment against defendants and in favor of plaintiffs on the issue of EPA's liability for failure to meet the statutory deadline. Because the "cases or controversies" requirement of Article III, Sec. 2 of the U.S. Constitution does not grant federal courts jurisdiction to grant a party judgment against itself, defendants have no legal right to the judgment they seek and thus are not entitled to summary judgment.

B. The Relief Plaintiffs Seek

The relief plaintiffs seek is neither novel nor controversial. Contrary to defendants' repeated misrepresentations, plaintiffs are not seeking to ban all communications between EPA and OMB. Nor are plaintiffs seeking review of the content or substance of EPA regulations. The remedy plaintiffs' seek - a declaration that OMB has no authority to delay regulations subject to statutory deadlines and an injunction prohibiting such conduct in the future - would not involve the Court in any way in dictating the content of EPA regulations; nor would it ban communications between EPA and OMB. It would simply require OMB to exercise its review powers in a manner that conforms to law.

Plaintiffs ask the Court simply to declare that OMB has no authority to use its regulatory review under Executive Order 12291 to delay regulations beyond the date of a statutory deadline. Thus, if a deadline already has expired, OMB has no authority to to delay regulations subject to the deadline in order to review them under the executive order. If the deadline is about to expire, OMB may review the regulations only until the time at which OMB review will result in the deadline being missed. EPA can determine when further delay due to OMB review will result in a deadline being missed from its tracking system that includes OMB release dates necessary to meet statutory deadlines.

Thus, OMB and EPA would be free to communicate with each other without restriction, but OMB could not require EPA to delay publication of proposed or final regulations subject to a statutory deadline when OMB review conflicts with the deadline. In essence, plaintiffs merely request the Court to order OMB to comply with Section 8(a)(2) of the executive order.

C. Defendants' Suggested June 30, 1986 Promulgation Date Is Not Reasonable.

Defendants seek an order from this Court allowing EPA until June 30, 1986 to issue the permitting standards Congress mandated by March 1, 1985. Defendants base this request in part on the assertion that it is consistent with schedules previously adopted by this Court in deadline litigation under the Clean Water Act. Yet careful review of the Court's order in those cases indicates that the Court generally adopted a schedule that provided for EPA's promulgation of regulation nine months after they were proposed. The June 30, 1986 date provides EPA with over a year from the publication of the proposed rule in the Federal Register to promulgate the final standards.

Defendants also imply that their schedule must be adopted because it is the schedule offered by EPA itself and the one the Agency currently is following. However, in past deadline cases, EPA often has asserted that it could not promulgate regulations before a certain date. Despite these claims, several courts have ordered EPA to promulgate regulations sooner than the

Agency claimed it reasonably could. *See, e.g. NRDC* v. *Ruckelshaus*, No. 84-758 (D.D.C. Sept. 14, 1984), 14 ELR 20817; *State of New York* v. *Gorsuch*, 554 F. Supp. 1060 (S.D.N.Y. 1983); *Environmental Defense Fund* v. *Gorsuch*, 17 ERC 1099 (D.D.C. 1982); *Sierra Club* v. *Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982); *State of Illinois* v. *Gorsuch*, 530 F. Supp. 340 (D.D.C. 1981). Thus, defendants assertion that June 30, 1986 is the earliest date by which EPA can reasonably promulgate the permitting standards is not dispositive of the schedule issue. Moreover, review of the schedule proposed by defendants indicates that it is not as expeditious as they claim.

Defendants' sole support for their proposed schedule is an eight page declaration by John Skinner, former Director of EPA's Office of Solid Waste. Dr. Skinner characterizes the schedule as "ambitious", considering "the complexity of this rule and the likelihood that our proposal will receive substantial public comments." Skinner Declaration at 4. The fact is, however, that the defendants schedule is longer than prior EPA schedules for this rule, longer than the promulgation schedule for regulations of similar complexity, and the proposed rule has not generated sufficient public comment to justify an extended schedule like the defendants propose.

Dr. Skinner states in his Declaration, defendants' schedule is based on an "expedited intra-agency review process", which includes shortened time periods for various steps in the rulemaking process and the elimination of "Steering Committee" review. Skinner Declaration at 4-5. The Skinner Declaration implies that the elimination of Steering Committee review is unusual, thereby indicating the expeditious nature of the proposed schedule. Skinner Declaration at 4. However, during his deposition, Mr. Skinner admitted that Steering Committee review has been eliminated for all but a very few RCRA rulemakings. Skinner Deposition at 52-53, PA-23. Furthermore, the decision to eliminate Steering Committee review for the underground tanks

he would consider comments averaging 40-50 pages to be
position at 43-45, PA-23. The length of the comments
t four times longer than the "typical" set of comments
exity of the rule. Id. at 45.
ceived only 77 comments on its proposal and the vast
e fives pages or less in length. See Declaration of Susan
comments exceeded the length Dr. SKinner thought a
nts would be (10 pages), and only three comments approach
th Mr. Skinner deemed "lengthy." In short, the defendants'
based on responding to as many as 4,000 pages of detailed
lity defendants' received approximately 16-17 percent of
er, only one person testified at an EPA sponsored public
sed rule in Washington, D.C.. Thus, except at OMB, this
controversial as EPA believed.
dmitted in his deposition, the defendants' proposed June
s not reflect a potentially shorter promulgation schedule
plexity of the comments received is not as anticipated.
e assigned "as needed" to meet the June 30, 1986
Skinner Deposition at 45-46, PA-23. Thus, defendants
nducting this rulemaking on an "as soon as possible"

evidence of the delays built into defendants' proposed
by comparing it to the schedule for promulgating new
l quantity generators. Section 3001(d) of RCRA, another
s, requires EPA to issue regulations governing generators
-1000 kg/mo of hazardous waste by March 31, 1986. These
ntially affect 175,000 generators of hazardous waste.
5 (August 1, 1985). Mr. Skinner believes the small

quantity generator rules are of "comparable importance and complexity and of interest to the regulated community" to the permitting standards in the instant case. Skinner Deposition at 47-48, PA-23. EPA proposed the small quantity generator rules for public comment on August 1, 1985 and received public comments on the proposal until September 30, 1985. 50 Fed. Reg. 31278 (August 1, 1985). As stated above, the Congressional deadline for promulgation of the final rule is March 31, 1986, or 6 months after the close of the comment period. On several recent occasions, EPA has indicated the small quantity generator rules will be issued on time. See PA-21; EPA Semiannual Regulatory Agenda, 50 Fed. Reg. 44679-80 (October 29, 1985). Yet in the instant case, defendants seek over 10 months from the close of the comment period to promulgation of the "comparable" rule.

Based on EPA's prior promulgation schedules, the paucity of public comment on the proposal, and the small quantity generators rules, a true expedited rulemaking would result in the promulgation of the tank standards by April 25, 1986.[21] The April deadline would provide EPA with eight months from the close of the comment period to final promulgation. It reflects the two months savings from the the elimination of the Steering committee review, and is still two months longer than EPA needs to issue the comparable small generator rules.[22]

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[21] In contrast to how EPA is managing the tank permitting standards rulemaking, the OSW Weekly Activities Report dated October 17, 1985, indicates the first work group meeting to discuss comments received on the small quantity generator proposal was held on October 16, 1985, less than three weeks after close of the comment period. A similar meeting on the tank standards, however, is not scheduled until January 15, 1986, almost five months after the close of the comment period. PA-26. This Weekly Activities Report also illustrates the pervasive role of OMB in EPA rulemaking in its description of the status of RCRA regulations concerning waste oil ("OMB continues to hold the proposal"), liner guidance ("still at OMB - review indefinitely extended"), location rules ("pending at OMB - milestone missed because of lengthy OMB review") and proposed codification rules ("still awaiting OMB response . . . EPA has agreed to meet with OMB to discuss this further").

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[22] In its prayer for relief, Plaintiffs' Amended complaint seeks a Court Order requiring promulgation of the final rule within 270 days of the proposal, or March 26, 1986. Plaintiffs still consider this relief appropriate at the time the Amended Compliant was filed. The lack of public comment received by EPA on the proposed rule should have resulted in at least an additional one month savings of time in promulgating the final rule. However, since about one third of the time has elapsed since the close of the comment period, and EPA has not been expediting this rulemaking thus far, plaintiffs have adjusted the relief sought to account for the time elapsed.

V. CONCLUSION

For the reasons stated above, the Court should grant plaintiffs' motion for summary judgment and deny defendants' motion for summary judgment.

Respectfully submitted,

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U.S. DISTRICT COURT
DEC 23 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-1747
(Flannery, J.)

ENVIRONMENTAL DEFENSE FUND, et al.,

Plaintiffs,

v.

LEE M. THOMAS, et al.,

Defendants.

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, et al., Plaintiffs, v. LEE M. THOMAS, et al., Defendants.	Civil Action No. 85-1747 (Flannery, J.)

PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT AND IN REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This Memorandum is submitted by plaintiffs the Environmental Defense Fund, Pamela R. Ford, and Scotty D. Ford, in opposition to defendants' supplemental motion for summary judgment and in reply to defendants' opposition to plaintiffs' motion for summary judgment. This case raises the question whether the Environmental Protection Agency ("EPA") and the Office of Management and Budget ("OMB") have the authority to delay promulgation of regulations beyond a statutory deadline in order for OMB to review the regulations under Executive Order 12291 ("EO 12291").

In response to plaintiffs' motion for summary judgment, defendants are unable to articulate any legal basis for OMB authority to delay issuance of regulations beyond a statutory deadline. Rather than defend the legality of OMB's actions, defendants assert only that OMB believes its actions are "justifiable" and that, in any event, this Court is powerless to stop them. Defendants' supplemental motion for summary judgment seeks to dismiss from this action OMB and its Director, James C. Miller III, ("OMB defendants") on the ground that the Court has no jurisdiction to render relief against them. Defendants' erroneous view of the Court's equitable powers would make it impossible for the judiciary to perform its proper role in a system of government founded on a constitutional separation of powers. Plaintiffs are entitled to summary judgment and the equitable relief they seek against both EPA and OMB defendants.

I. EVEN THOUGH EPA AND OMB HAVE NO AUTHORITY UNDER EO 12291 TO DELAY PROMULGATION OF EPA REGULATIONS BEYOND STATUTORY DEADLINES, DEFENDANTS CANNOT DENY THAT THEY HAVE DONE SO AND WILL CONTINUE TO DO SO.

A. EPA and OMB have No Authority to Delay Promulgation of EPA Regulations Beyond Statutory Deadlines.

As discussed in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Pl. Mem."), neither Executive Order 12291 nor any other source of authority empowers EPA and OMB to delay promulgation of regulations beyond the deadlines specified by Congress. Pl. Mem., at 14-20. Indeed, defendant Miller himself, the U.S. Department of Justice and this Court all have stated clearly that OMB review under Executive Order 12291 cannot legally delay promulgation of regulations beyond statutory or judicial deadlines. Id., at 15-17.

In their response to plaintiffs' motion for summary judgment, defendants are unable to articulate any legal authority for OMB's actions. Nor can they dispute that the President does not have the constitutional power to authorize OMB and EPA to contravene the commands of Congress. Defendants concede that OMB has no power to prevent an agency from performing its statutory obligations or to require an agency to conform to its views. Defendants' Memorandum in Support of Their Motion for Summary Judgment and in Reply to Plaintiffs' Cross-Motion for Summary Judgment ("Def. Mem."), at 38. Yet defendants argue that the Court should ignore OMB's actions, regardless of their legality, because "Congress was aware of the President's program under Executive Order 12291 when it passed the 1984 RCRA Amendments." Def. Mem., at 9.

Defendants' assertion that congressional silence can be interpreted as acquiescence in OMB's use of EO 12291 to delay regulations beyond the deadlines in the 1984 Amendments is doubly erroneous. Congress need not assume, when it enacts a new statutory deadline, that unless it specifically prohibits all means for violating it, the deadline will be disregarded. Moreover, Congress was not silent when it enacted the 1984 Amendments to RCRA. The House Committee report that accompanied the 1984 Amendments states:

> "The Committee is extremely concerned that EPA has not been able to comply with past statutory mandates and timetables, not just for RCRA, but for virtually all its programs. . . . The Administrator's ability to meet this deadline [for publishing a schedule for land disposal ban decisions] as with all other deadlines in this bill, shall not be impaired in any way whatsoever by Executive Order 12291." Hazardous Waste Control and Enforcement Act of 1983, Report of the House Comm. on Energy & Commerce, 98th Cong., 1st Sess., May 17, 1983, at 34, 35 (emphasis supplied) (hereinafter "House HSWA Report"), 1984 U.S. Code Cong. & Admin. News 5576, 5593-94.

Thus, Congress has indicated with unmistakable clarity that it has not acquiesced in OMB's use of EO 12291 to delay promulgation of regulations beyond the date of deadlines in the 1984 Amendments.

Defendants concede that the procedures of EO 12291 "do not apply to the extent that they conflict with a statutory or judicially imposed deadline." Def. Mem., at 39. However, they adopt a curious interpretation of the word "conflict" for they maintain that EO 12291 "does not contain a per se exclusion from its requirements when a statutory deadline has been missed." Id. Defendants base this interpretation on the proviso in section 8(a)(2)

s passed," Def. Mem., at 40, cannot be reconciled with
ompliance with EO 12291 is voluntary.
defendants' argument were accepted, it suggests only
t prohibit OMB from delaying regulations once a
it does not indicate that the executive order
n. As the Court already has recognized, contrary to
laintiffs are not seeking to "enforce" EO 12291 or
nts have "violated" it.[1/] Plaintiffs instead argue that
to delay regulations beyond the date of statutory
o in section 8(a)(2) of EO 12291 actually provides
laintiffs' position that EO 12291 does not authorize OMB
once a deadline has passed.[2/]
thing in EO 12291 can authorize OMB to delay promulgation
a statutory deadline for if it did EO 12291 would

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d in its Memorandum Order of October 29, 1985: "With
legal claims are proper, both the original complaint and
allege that Executive Order 12291 did not give OMB the .
OMB review and clearance of regulations subject to
Original Complaint, para. 29; Amended Complaint, para.
to enforce the Executive Order is not in issue."
29, 1985, at 5 (emphasis supplied). Nevertheless,
o repeat their irrelevant argument that "This Court Has
force Executive Order 12291." Def. Mem., at 19

nts' claim, plaintiffs did not "overlook" the proviso in
12291, which was quoted in its entirety on page 26 of
. As plaintiffs noted in their memorandum, the proviso
cy with a regulation for which OMB review would conflict
publish in the Federal Register a statement of the
racticable for the agency to follow the procedures of
t to such a rule," a procedure that has been ignored by
at 26-31. The fact that the proviso authorizes
only "to the extent permitted by statutory or judicial
t further support for the conclusion that EO 12291 does
ew once a deadline has expired.

unconstitutionally exceed the limits of the President's powers under Article II of the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Pl. Mem., at 17-20. Because defendants have not been able to articulate any basis for OMB authority to delay promulgation of EPA regulations beyond a statutory deadline, the Court need not confront the constitutional issue that would be presented if it assumed that such authority exists.

B. OMB's EO 12291 Review Has Delayed, and Will Continue to Delay Promulgation of EPA Regulations Beyond Statutory Deadlines.

Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment demonstrated that, even though OMB has no authority to delay EPA's promulgation of regulations beyond statutory deadlines, OMB frequently does so. Plaintiffs demonstrated that OMB and EPA routinely ignore the exemption in section 8(a)(2) of EO 12291 for regulations for which OMB review would conflict with deadlines. Pl. Mem. at 26-31. At least 169 EPA regulations subject to statutory or judicial deadlines have been reviewed by OMB under EO 12291 and on 86 occasions OMB extended its review of them, sometimes for several months, and on other occasions for several years past the deadline. Pl. Mem. at 26-27. Plaintiffs documented in great detail how, even though the statutory deadline for promulgation of the standards required by Section 3004(w) of RCRA had expired, OMB extended its review of the proposed regulations and delayed their publication for several months until EPA agreed to make changes in them at the insistence of OMB. Pl. Mem., at 20-25.

In response to plaintiffs' overwhelming documentation, defendants are unable to deny that OMB's EO 12291 review frequently delays promulgation of EPA regulations beyond statutory deadlines. Instead, they assert that OMB believes any delays are "justifiable" and that OMB is not solely responsible for all delays or all modifications in the substance of EPA regulations. Rather than defending the legality of OMB's actions, defendants' assertions confirm that OMB and EPA ignore the section 8(a)(2) exemption in EO 12291 and that EO 12291 review delays promulgation of EPA regulations beyond statutory deadlines.

The Declaration of Robert P. Bedell establishes that although OMB is well aware of statutory deadlines and the section 8(a)(2) exemption in EO 12291, OMB still insists on reviewing proposed and final EPA regulations prior to their publication even if that review extends beyond a deadline or occurs after the deadline has expired. Mr. Bedell states that OMB seeks to "accommodate" EO 12291 review with statutory deadlines through early discussions between OMB and EPA that establish what review procedures will apply to regulations subject to deadlines. Bedell Declaration, at 7-9. These "accommodations," however, are designed primarily to accommodate OMB review rather than to ensure that deadlines are met.

For example, Mr. Bedell states that OMB was well aware of the statutory deadline for the section 3004(w) regulations and made special efforts to accelerate EO 12291 review and to complete it as soon as possible.[3] Bedell Declaration, at 8-13. Mr. Bedell states that he had discussed the rule with EPA prior to its submission to OMB, that the rule was submitted simultaneously to OMB and Red Border review, and that "at the earliest stages of OMB review, the Administrator of OIRA and the Director of OMB were aware of the draft rule, the issues it presented and the statutory deadline." Bedell Declaration, at 9-10, 12-13. While he notes that EPA's Red Border review extended only to March 22, Bedell Declaration, at 10, he does not discuss what transpired after that.

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[3] Defendants erroneously claim that plaintiffs believe "that OMB was unaware of the statutory deadline because a [sic] OMB staff member had checked the column 'standard' in the Regulatory Docket Worksheet." Def. Mem., at 5 n.2. In fact, plaintiffs stated that "EPA and OMB clearly were aware of the statutory deadline for promulgating the permitting standards at the time the proposed standards were submitted to OMB for review under Executive Order 12291." Pl. Mem., at 7 n.6. The fact that OMB extended its review and delayed publication of the standards even though it was aware of the deadline makes its actions even more egregious and provides further evidence of the need for relief against OMB.

In fact, documents presented by plaintiffs, whose accuracy defendants did not dispute, indicate that for almost six weeks after EPA had submitted the permitting standards to OMB for review, EPA did not receive any comments from OMB. Memorandum from Penelope Hansen to John P. Lehman, April 10, 1985, SA-3; Pl. Mem. at 23. Although EPA staff had already briefed OMB staff and EPA officials expected OMB review to take no longer than the 10 days contemplated by EO 12291, Skinner Deposition, at 104, 105, OMB extended its review pursuant to section 3(f)(1) of the executive order. Coad Letter, PA-3; Skinner Deposition, at 108-111.[4] EPA officials clearly understood that the effect of OMB's extended review was that EPA "did not have the authority" to cause the proposed regulations to be published until OMB had completed its review. Skinner Deposition, at 111.

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[4] Although the Coad letter does not cite section 3(f)(1), it is clear that this letter informed EPA that OMB was extending its review of the section 3004(w) standards pursuant to section 3(f)(1) of EO 12291. The Coad letter states that the permitting standards NPRM for hazardous waste tanks and two other rules have been submitted "for Executive Order 12291 review," and that OMB has "found it necessary to extend the normal period of review for these rules." Document #3 in Public Appendix to Pl. Mem. ("PA-3"). In response to Interrogatories #10(d) to OMB and #12(c) to EPA, both of which asked "[w]hether or not OMB extended its review of the . . . regulation pursuant to Section 3(f) of Executive Order 12291," both OMB and EPA specifically admitted that OMB extended review of the tanks NPRM. OMB Response to Interrogatory #10(d), Computer Printout, at 69 (appended to Plaintiffs' Reply Memorandum); EPA Response to Interrogatory #12(c), Attachment A, at 1. OMB and EPA also have both admitted that the Coad letter informed EPA of this extended review. In response to Interrogatory #5 to EPA, Attachment C, Document 23, EPA specifically identified the Coad letter as "OMB extension letter," and stated that "OMB sent this letter to notify EPA of the extension of its review of the revised tanks rules." OMB also identified the Coad letter as "OMB Extension Letter to EPA." OMB Response to Interrogatory #2, Attachment 2, Document 22.

When OMB staff finally met with EPA staff on April 16, 1985, they insisted that EPA make changes in the proposed regulations. Pl. Mem., at 10-11. OMB staff were not content simply to advise EPA staff of their views, but instead insisted on seeing the actual changes to the proposed regulations. Pl. Mem., 11-14. Thus, OMB did not complete its EO 12291 review of the section 3004(w) standards until 100 days after EPA's submission of the proposed regulations and two weeks after this lawsuit was filed. Pl. Mem., 13-14.

If OMB's review of EPA's proposed section 3004(w) regulations is indicative of what Mr. Bedell considers to be OMB's best efforts to accommodate statutory deadlines with EO 12291 review, it is clear that OMB is insisting on nothing less than the ability to delay an EPA regulation indefinitely, regardless of any deadline, until EPA agrees to make changes in its substance. OMB extended its review of the section 3004(w) standards not simply to give it more time to formulate its views, but to ensure that its views were adopted by EPA. While OMB asserts that it does not "unjustifiably" delay EPA's promulgation of regulations subject to deadlines, Defendants' Objections to Plaintiffs' Statement of Material Facts, at 4-5, it apparently believes that it can be the sole judge of what delays are "justifiable."

Mr. Bedell never discusses why statutory deadlines are not accommodated by simply permitting EPA to publish its proposed regulations before they are submitted to OMB for review. Although he indicates that section 8(a)(2) of EO 12291 and OMB's own standard review forms reflect the availability of such a procedure, Bedell Declaration, at 6, 10-11, 12, he confirms that this is virtually ignored by OMB and EPA.[5] Although Mr. Bedell states that "agencies can, and have, published a proposed or final rule without submitting the draft for OMB review," Bedell Declaration, at 7, he fails to note that this has occurred only five times in the last five years (and not since 1983), and then only over vehement OMB objections. Pl. Mem., at 31 & n.20. Thus, while Mr. Bedell confirms that a procedure exists for bypassing OMB review, he does not explain why OMB and EPA refuse to use this procedure to accommodate deadlines.

In response to the charge that OMB's EO 12291 review often delays regulations beyond statutory deadlines, Mr. Bedell offers some statistics, allegedly to demonstrate that OMB completes its reviews rapidly. While these statistics are largely irrelevant to plaintiffs' claims, they do illustrate OMB's special interest in EPA regulations and that if OMB disagrees with an EPA regulation, OMB will delay it for months, and sometimes even years, regardless of deadlines.

For example, Mr. Bedell indicates that for most regulations, OMB completes its EO 12291 review rapidly, usually within the ten days contemplated in the executive order. This is hardly surprising because most regulations submitted to OMB are of little significance either because they involve minor revisions in regulations or regulations that are not national in scope.[6] However, Mr. Bedell's own statistics indicate that a smaller percentage of EPA regulations are cleared within 10 days by OMB than is the norm for all regulations (72.6% v. 81% for all regulations) and that OMB takes more than 30 percent longer on average to review EPA regulations (20 days average) than for non-EPA regulations (15 days average).[7] Although Mr. Bedell does not present overall statistics on OMB's average review time for EPA regulations subject to statutory or judicial deadlines, these can be derived from the evidence submitted by plaintiffs. They indicate that OMB takes far longer to review RCRA regulations subject to deadlines (an average of more than 52 days) than is typical for other EPA regulations.[8] Thus, despite OMB's supposed efforts to accelerate review of regulations to accommodate deadlines, OMB's review results in longer delays for RCRA regulations subject to deadlines than for other regulations.

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[5] For example, Mr. Bedell notes that OMB's Standard Form 83 has separate boxes under the category "Type of Review" for "Statutory or Judicial Deadline" and "Standard" review. Mr. Bedell states that although EPA had checked the "Statutory or Judicial Deadline" box when it submitted the permitting standards to OMB, OMB checked the "Standard" box when it completed its EO 12291 review. He explains that the "Standard" box was checked by OMB not because the regulations received "business-as-usual" review, but "because it is our practice for purposes of our statistical analysis to check the box 'statutory or judicial deadline' only when a rule is not submitted for our review before publication because of a statutory or judicial deadline." Bedell Declaration, at 12. But he does not explain why the latter procedure was not followed in this case.

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6. For example, one commentator has noted that overall statistics about OMB's EO 12291 reviews are "misleading because most of the thousand-odd rules sent by EPA to OMB are of minor significance; only perhaps a fourth or less are of substantial influence, and only a handful were designated 'major'." Olson, "The Quiet Shift of Power: Office of Management and Budget Supervision of Environmental Protection Agency Rulemaking under Executive Order 12291," 4 Va. J. Nat. Res. L. 1, 44 n.216 (1984).

7. The 15 day average review time for non-EPA regulations is derived by subtracting the 1,872 EPA regulations reviewed by OMB (with an average review time of 20 days) from the 11,716 total regulations reviewed by OMB (with an average review time of 16 days) and recalculating the average review time.

8. This figure was derived by comparing the dates of submission to OMB of the twelve RCRA regulations subject to statutory deadlines listed in Attachment G to EPA's Response to Interrogatory #10 with the dates OMB completed review listed in Attachment A of EPA's Response to Interrogatory #12. The 52 day figure is an underestimate because OMB was still holding up the Double Liner Requirements proposed regulation that had been submitted to it on July 11, 1985 when EPA responded to Interrogatory #12 on November 20.

Mr. Bedell's discussion of OMB review of EPA Air Office rules subject to judicial deadlines also is illuminating. Apparently Mr. Bedell believes that delays to accommodate OMB review are justifiable so long as it is not solely OMB's fault that a deadline is missed. Mr. Bedell notes, for example, that EPA "published rules after the judicial deadline in 69% of the cases" largely because "it takes EPA some time after our review has been completed before the rule is then sent to the Federal Register." Bedell Declaration, at 16. However, because there was only one instance in which the rule actually was at OMB when the judicial deadline expired, Mr. Bedell is unconcerned about the impact of OMB review on EPA's ability to meet deadlines.

Even more significant is his discussion of Air Office rules subject to statutory deadlines. He notes that in three-fourths of the cases the deadline had already passed when EPA submitted the rules to OMB for review, and that OMB "completed its review" of the other fourth in an average of 34 days. Bedell Declaration, at 16. Mr. Bedell neglects to mention not only that OMB's average review time for the first three-fourths (where the deadline already had passed) was 59 days,[9] but also that sometimes OMB "completed its review" by disapproving EPA's regulations. Thus, while Mr. Bedell asserts that "[i]n only one instance was a final rule under review at OMB while a statutory deadline passed," Bedell Declaration, at 16-17 (emphasis supplied), he fails to mention that OMB caused EPA to miss the deadline for eleven new source performance standards even though each of them were submitted to OMB months before the August 7, 1982 deadline. This occurred because OMB refused to complete its review of the proposed regulations or vetoed the final regulations.[10]

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[9] This figure can be calculated from the data Mr. Bedell presents by subtracting the product of the number of regulations in the first fourth (27) times their average review time (34), which is 918, from the product of the total number of regulations (100) times their average review time (52), which is 5200, and dividing the result (4282) by the number of regulations in the three-fourths (73).

Thus, it is apparent from the Bedell Declaration that OMB has reviewed, and will continue to review under EO 12291 regulations subject to statutory deadlines even after a deadline has expired and even if OMB review will further delay promulgation of the regulations beyond the deadline. OMB recognizes no limits on its ability to block publication of regulations during EO 12291 review in order to insist that changes be made in them.

While defendants attempt to characterize EO 12291 as a "political" rather than a "legal" requirement, Bedell Declaration, at 3-5, its consequences for EPA's ability to publish in timely fashion regulations subject to deadlines are the same regardless of how it is characterized. Similarly, it makes little difference whether EPA or OMB is deemed primarily responsible for an failure to meet a certain deadline, for it is clear that the EO 12291 review process exacerbates delays in publishing regulations. While it is clear that in this case OMB used its ability to delay publication of the section 3004(w) regulations to require changes in their substance, both agencies ultimately must share responsibility for failure to meet the deadline. Thus, it is not necessary for the Court to inquire into why individual changes were made in the proposed regulations. All that is necessary is to require both OMB and EPA to obey the law, which does not authorize EO 12291 review once a statutory deadline has expired.

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[10] "EPA delivered all eleven of these NSPS's well before the statutory promulgation deadline of August 7, 1982. OMB held all of them well beyond the deadline; indeed, two NSPS's were held at least ten months past the date. One rule, the stationary internal combustion NSPS, was vetoed twice during more than two years of OMB review. Though the statutory deadline has passed, OMB has made clear its intention to continue to review NSPS's currently being developed well behind EPA's required schedule. This OMB review is in direct conflict with the Executive Order." Olson, supra note 5 at 68-69 (citations omitted). See also Appendix B to this Memorandum.

II. THIS COURT HAS JURISDICTION OVER THIS ACTION AND THE AUTHORITY TO GRANT PLAINTIFFS RELIEF AGAINST ALL DEFENDANTS, INCLUDING OMB.

In response to plaintiffs' motion for summary judgment, defendants now seek to concentrate their defense on a belated attempt to challenge the jurisdiction of this Court. Defendants confuse the question of the scope of the Court's equitable powers with the issue of the Court's jurisdiction over this action. Defendants' "jurisdictional" argument is based largely on their repeated misrepresentation of the nature of the relief plaintiffs seek. The Court clearly has jurisdiction over this action and the authority to grant plaintiffs' requested relief against all defendants, including OMB.

A. The Court Has Jurisdiction over This Action and over All Defendants.

Plaintiffs' Amended Complaint alleges that EPA and OMB violated both section 3004(w) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6924(w), and the Administrative Procedure Act ("APA"), 5 U.S.C. 706. Plaintiffs maintain that both EPA and OMB are responsible for the failure to promulgate the regulations required by section 3004(w) of RCRA by the statutory deadline of March 1, 1985 and that both have unlawfully withheld and unreasonable delayed agency action and have acted in excess of their statutory jurisdiction and authority in violation of the APA. Plaintiffs have a private right of action to bring these claims under both section 7002(a)(2) of RCRA, 42 U.S.C. 6972(a)(2), and section 10 of the APA, 5 U.S.C. 702. This Court has jurisdiction to hear this action pursuant to both 28 U.S.C. 1331 (federal question jurisdiction) as well as 28 U.S.C. 1361 (mandamus).[11]

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[11] Section 1331 of Title 28 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the U.S." Section 1361 of Title 28 provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Defendants (cont'd on next page)

Defendants concede that the Court has federal question jurisdiction pursuant to 28 U.S.C. 1331 over both plaintiffs' RCRA and APA claims. However, they argue that the Court has no jurisdiction under either statute to render any relief against OMB. Defendants' argument is founded entirely on the notion that the Court's equitable powers to remedy violations of RCRA are strictly limited to imposing a deadline on EPA for promulgating regulations. While this proposition is flatly wrong for reasons discussed below, it addresses only the question of the scope of the Court's equitable powers, and does not establish that the Court lacks jurisdiction over OMB, which plaintiffs allege is jointly responsible for the RCRA violation.

Similarly, defendants argue that the APA does not provide a basis for relief against OMB, but again their argument is not a jurisdictional argument but rather an assertion that OMB has not violated the APA. See Def. Mem. at 16-19. Defendants concede that the Court has federal question jurisdiction over violations of the APA, Def. Mem., at 16, and that the Court can compel agency action unlawfully withheld or unreasonably delayed. Def. Mem., at 19 n.7. Their only "jurisdictional" argument is that OMB has not violated the APA because the March 1, 1985 statutory deadline had expired before OMB delayed the regulations. Id. This is an erroneous assertion about the merits of plaintiffs' APA claim, and not a jurisdictional argument.

Defendants also repeat the argument that the Court has no jurisdiction to enforce Executive Order 12291. As noted above, plaintiffs have made it clear that this action is not an action to "enforce" Executive Order 12291, but rather is premised on the fact that EO 12291 does not authorize OMB to delay EPA's promulgation of regulations beyond statutory deadlines. As the Court

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erroneously state that "[p]laintiffs did not expressly plead the Mandamus Act, 28 U.S.C. 1361 as a basis for jurisdiction." Def. Mem., at 17 n.6. Paragraph 2 of Plaintiffs' Amended Complaint expressly cites the Mandamus Act as a basis for jurisdiction.

stated in its Memorandum Order of October 29, 1985: "With regard to whether the legal claims are proper, both the original complaint and the amended complaint allege that Executive Order 12291 *did not give OMB the authority* to require OMB review and clearance of regulations subject to statutory deadlines. Original Complaint, para. 29; Amended Complaint, para. 37. Plaintiffs' right to enforce the Executive Order is not in issue." Memorandum of October 29, 1985, at 5 (emphasis supplied). Thus, defendants' argument is irrelevant to the Court's jurisdiction.[12]

B. *Plaintiffs' Amended Complaint States A Proper Claim Against OMB Upon Which Relief May Be Granted*.

Although defendants previously moved for summary judgment allegedly in favor of OMB defendants, they now seek to dismiss them from the case on the ground that plaintiffs have failed to state a claim against OMB on which relief may be granted.[13] In their supplemental motion for summary judgment,

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12. There is no question that the Court has jurisdiction over this action under 28 U.S.C. 1331 because it is a suit in equity to enjoin officials from threatened actions alleged to be in excess of their authority under the Constitution and federal law. Although it is not necessary to have an independent basis for jurisdiction, jurisdiction also can be found under the Mandamus Act, 28 U.S.C. 1361. Under the Mandamus Act district courts have "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Although defendants argue that mandamus jurisdiction is not applicable to OMB, they overlook the fact that such jurisdiction applies in cases where an officer is alleged to be acting without authority, *Martinez* v. *Marshall*, 573 F.2d 555 (9th Cir. 1977); *Miller* v. *Ackerman*, 488 F.2d 920 (8th Cir. 1973); Wright & Miller, *Federal Practice and Procedure* sec. 3655, at 241 (1985), as plaintiffs allege OMB acted in this case. *Cf*. *State Highway Comm'n of Missouri* v. *Volpe*, 479 F.2d 1099 (8th Cir. 1973) (injunction issued against Director of OMB for impounding federal highway funds without authority; court finds it unnecessary to decide whether district court properly found mandamus jurisdiction because federal question jurisdiction exists).

13. Defendants seek to justify their belated attempt to dismiss the OMB defendants on the ground that it was only after plaintiffs amended their complaint that relief was sought against OMB. This, however, is the same (cont'd on next page)

defendants argue that OMB should be dismissed from this action because the Court is powerless to render relief against OMB. As noted below, the Court's equitable powers to remedy violations of RCRA and the APA are broad and clearly encompass relief against OMB of the kind sought by plaintiffs. Contrary to defendants' repeated claim that plaintiffs' seek to "bar all consultations" between OMB and EPA, plaintiffs seek more limited relief that clearly is appropriate in this case. Plaintiffs seek only a declaration that OMB and EPA have no authority to delay promulgation of regulations beyond statutory deadlines due to EO 12291 review, and an injunction prohibiting such action with respect to regulations subject to deadlines in the 1984 Amendments to RCRA. Because plaintiffs have demonstrated that OMB has contributed to EPA's failure to meet statutory deadlines in RCRA by acting in excess of its authority under EO 12291, plaintiffs are entitled to equitable relief against both OMB and EPA to remedy this violation.[14]

Plaintiffs also clearly state a claim for relief against OMB under the APA, which authorizes a reviewing court "hold unlawful and set aside agency action" found to be "in excess of statutory jurisdiction [or] authority" and to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1) & (2)(C). In previous instances where OMB has impounded funds without legal authority, courts have issued declaratory and injunctive relief

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argument the government made in opposing plaintiffs' motion to amend the complaint, which the Court rejected. As the Court's order of October 29, 1985, acknowledged: "OMB has always been a party to this action and its authority in the promulgation of the regulations has always been in issue. The amendments simply spell out more clearly the role and the nature of the relief sought by plaintiffs. The issuance of injunctive and declaratory relief against defendants was requested by plaintiffs in general terms from the very start." Memorandum of October 29, 1985, at 6.

[14] As noted below, the availability of equitable relief to prevent OMB from interfering with EPA's performance of its statutory obligations under RCRA does not depend on a finding that OMB itself has violated RCRA. See *infra* at 25.

291 because such action is clearly prohibited

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statutory deadline. OMB's actions have been interpreted by EPA as having the "status of law" by rendering EPA without authority to publish proposed regulations pending OMB review. Skinner Deposition, at 111. Finally, judicial review of the legality of OMB's actions would not in any way interfere with the proper functioning of administrative agencies, but would instead remove an obstacle to the agencies' performance of their legal obligations.

It is a well established principle of administrative law that courts will not lightly interpret a statute to confer unreviewable power on an administrative agency. Morris v. Gressette, 432 U.S. 491 (1977); Dunlop v. Bachowski, 421 U.S. 560, 567 (1975). Unless the statute implicated by the agency's decision is entirely silent on the factors that would govern a court's review of the legality of the decision so that courts would have "no law to apply" in reviewing the agency action, unreviewability should not be inferred. Southern Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455 (1979); cf. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

This clearly is not a case where there is "no law to apply" in reviewing the legality of OMB's actions. The congressional directives embodied in the deadlines in RCRA could not be more explicit. The provisions of EO 12291 also clearly indicate that these deadlines are to be respected by OMB. OMB has been entirely unable to articulate any basis on which it has authority to use EO 12291 to delay publication of regulations beyond the clear statutory deadlines. Thus, the reviewing court's task in determining the legality of OMB's actions is an easy one and this is precisely the kind of case for which Congress authorized judicial review under the APA.

Although defendants argue that consultations between OMB and EPA do not violate RCRA or the APA, Def. Mem., at 16, it is clear that what plaintiffs seek in this action is not to bar "consultations" between the two agencies, but to prevent delays beyond statutory deadlines. Contrary to defendants' claim, the relief sought by plaintiffs will not in any way require the Court to make judgments about which agency caused delays or what the content of EPA regulations should be. Indeed, if relief is entered against both OMB and EPA, such inquiries will be totally unnecessary.

C. This Court Has the Authority to Grant Plaintiffs Relief Against All Defendants, Including OMB.

Defendants' "jurisdictional" arguments are founded almost entirely on the erroneous notion that the Court's equitable powers to remedy violations of RCRA are restricted to one and only one remedy: an order specifying a new date for promulgation of the section 3004(w) standards. Defendants confuse the nature of the violation of RCRA - the failure to perform a non-discretionary duty - with the scope of equitable relief available to the Court to remedy the violation. Thus, throughout their memorandum defendants assert that the Court has no jurisdiction to render any relief against OMB and is powerless to do anything other than set a new deadline for EPA. Defendants' extraordinarily narrow view of the Court's equitable powers is contrary to centuries of precedent and would render the judiciary unable to perform its proper role in a constitutional system based on separation of powers.

1. The Court's equitable powers to remedy defendants' violations are broad and have not been restricted by RCRA or the APA.

Contrary to defendants' claim, the equitable powers of the Court to remedy defendants' violations of RCRA and the APA are broad and they clearly extend to the relief sought by plaintiffs. In Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944), the Supreme Court described the equity jurisdiction of the federal courts, which stems from a "practice with a background of several hundred years of history," as broad and flexible. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." Similarly, in Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946), the Court noted that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." The Court described what these powers encompass as follows:

> "It may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances." 328 U.S., at 398.

The equitable powers of a federal court "assume an even broader and more flexible character" in a proceeding involving the public interest "than when only a private controversy is at stake." Id. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Virginia Ry. Co. v. System Federation, 300 U.S. 515, 552 (1937). Courts have recognized that this principle applies in deadline cases, where the courts' equitable powers are exercised "in effectuating the congressional objective incorporated in regulatory legislation." Natural Resources Defense Council v. Train, 510 F.2d 692, 713 (D.C. Cir. 1974).

Defendants' argument that the Court's equitable powers extend only to issuing a new deadline for EPA's promulgation of the section 3004(w) regulations is inconsistent with the principle that restrictions on a court's equitable powers are not to be lightly inferred. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); Brown v. Swann, 35 U.S.(10 Pet) 497, 503 (1876). Most recently in United States v. Rodgers, 461 U.S. 677, 705 (1983), the Supreme Court described as "an important principle of statutory construction" that "Congress should not lightly be assumed to have enacted a statutory scheme foreclosing a court of equity from the exercise of its traditional discretion."

Nothing in RCRA or the APA can be interpreted as overcoming this heavy presumption against limitations on the Court's equitable powers. The citizen suit provision in section 7002 of RCRA simply states that the district court has jurisdiction "to order the Administrator [of EPA] to perform such act or duty," 42 U.S.C. 6972(a)(2). It does not indicate any congressional intent to limit the use of the court's equitable powers to ensure that the act or duty is performed. In fact Congress specifically disavowed any intent to restrict the availability of other relief. Section 7002(f) of RCRA provides: "OTHER RIGHTS PRESERVED - Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law . . . to seek any other relief (including relief against the Administrator or a State agency)." In Natural Resources Defense Council v. Train, 510 F.2d 692 (D.C. Cir. 1974) the D.C. Circuit relied on a similar clause in the Federal Water Pollution Control Act to reject the government's argument that the Act had restricted the court's equity jurisdiction.

Moreover, in previous deadline cases it has been recognized that in order to remedy the violation of a non-discretionary duty the court may order the performance of certain acts (reporting obligations, formulation of timetables that do not allow for certain procedures such as EO 12291 review, issuance of proposed regulations) that go beyond the bare non-discretionary duty of promulgating the final regulations. See, e.g., Illinois v. Costle, 12 ERC 1597, 1598-99 (D.D.C. 1979); Natural Resources Defense Council v. Ruckelshaus, 14 ELR 20817, 20818 (D.D.C. 1984). Thus, plaintiffs are incorrect in arguing that the Court has no authority to "specify the procedures the agency must or must not follow to complete the rulemaking." Def. Mem., at 42.

Furthermore, as defendants concede, the Court's equitable powers to remedy violations of the APA authorize it to compel agency action unreasonably withheld or unlawfully delayed, Def. Mem., at 19 n.7, as well as to set aside agency action taken without jurisdiction or authority. This can be accomplished by use of a detailed equitable decree once a finding of unlawful or impermissible agency action has been made. NRDC v. Gorsuch, 16 ERC 2084, 2088 (D.D.C. 1982). "Once the hurdle of original authority to fashion a decree is cleared, the primary touchstone for determining whether any given decree impermissibly infringes on an agency's discretion appears to be whether the decree is result oriented or procedure oriented." Id. So long as the decree "does not seek to control any of the EPA's final results, . . . but instead merely seeks to compel the EPA to implement the process that Congress intended," it is within the Court's equitable powers. Id. The relief plaintiffs seek in this case will not in any way dictate the substance of the regulations EPA ultimately adopts. Rather it will simply implement the process Congress intended for EPA to follow, which clearly did not authorize

EO 12291 review when such review would delay promulgation of regulations in violation of statutory deadlines.

The Supreme Court also has recognized that the jurisdiction of federal courts extends to the enforcement of equitable relief against persons who interfere with the legal obligations of others even if those persons were not parties to the original decree establishing those legal obligations. In Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.33 (1979), the Supreme Court held that even "nonparties who interfere with the implementation of court orders establishing public rights may be enjoined," citing United States v. Hall, 472 F.2d 261 (5th Cir. 1972) where a criminal contempt conviction was upheld against a person who though neither a party nor bearing any legal relationship to a party violated an order designed to protect a court's judgment in a school desegregation case. See also Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). Where, as here, plaintiffs have clearly shown that OMB has interfered with EPA's fulfillment of its legal obligation by delaying EPA's promulgation of regulations beyond statutory deadlines, the Court's equitable powers authorize it to enjoin such illegal action.[15] Thus, OMB properly may be bound by the equitable relief granted by the Court regardless of whether or not the Court holds that OMB independently has violated RCRA. Any contrary construction of the scope of the Court's equitable powers would leave the judiciary powerless to uphold the law. OMB would be free to block EPA's publication of regulations regardless of statutory deadlines or court orders directed against EPA.

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15. Cf. Rule 65(d) of the Federal Rules of Civil Procedure which specifies that an injunction is binding upon "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise".

2. The relief sought by plaintiffs does not exceed the equitable powers of this Court.

Defendants' argument that the Court lacks authority to grant plaintiffs relief also is founded in large part on defendants' misrepresentation of the nature of the relief plaintiffs seek. Defendants repeatedly state that plaintiffs seek to "bar," "prevent", or "limit consultations" between OMB and EPA.[16] Thus, they argue that "this Court has no jurisdiction to issue a blanket order preventing consultations between OMB and EPA," Def. Mem., at 7, and they maintain that plaintiffs ask the "Court to intrude into the constitutional prerogative of the Executive Branch to consult within itself." Def. Mem., at 44.

As plaintiffs have repeatedly stated, the relief they seek in this case will not in any way prohibit "consultations" between OMB and EPA. Plaintiffs seek only to enjoin defendants from using the EO 12291 review process to delay promulgation of regulations beyond statutory deadlines. The distinction between "consultation" and resort to the formal EO 12291 review process is important and clearly defined. The essence of EO 12291 review is that EPA is required to refrain from publishing regulations until OMB has completed review under EO 12291. EO 12291, sec. 3(f). Indeed, the executive order authorizes OMB to extend its review indefinitely, which effectively blocks publication of the regulations by EPA. Because this power to delay publication of regulations must fall in the face of statutory deadlines, the Court properly may enjoin OMB's unauthorized use of EO 12291 review to block publication of regulations when such review would delay their publication beyond a statutory

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16. This mischaracterization of the nature of the relief plaintiffs seek appears nineteen times in defendants' memorandum (16 times in the first 17 pages). Def. Mem., at 2, 7 (twice), 9 (three times), 10, 11, 15 (five times), 16 (twice), 16-17, 23, 37, 44.

deadline. Such an injunction would not preclude OMB and EPA from communicating and consulting with one another; it simply would prevent them from using EO 12291 review to delay publication of regulations beyond a deadline.

The relief plaintiffs seek would not intrude in any sense on the discretionary functions of executive branch officials. Executive branch officials do not have discretion to violate statutory deadlines and have no authority to delay publication of regulations beyond the date of such deadlines in order to accommodate EO 12291. Plaintiffs seek only to require OMB and EPA officials to refrain from such illegal conduct to vindicate the clear congressional directives that are being frustrated by their actions.

Moreover, EO 12291 itself clearly acknowledges that the Court has authority to bar OMB review after a statutory deadline has expired. As defendants repeatedly note, EO 12291 authorizes OMB review only "to the extent permitted by statutory or _judicial_ deadlines." EO 12291, sec. 8(a)(2) (emphasis supplied). If this Court determines in formulating the remedy for defendants' illegal action not to permit EO 12291 review of the final regulations, EO 12291 itself would not authorize such review. Thus, it is impossible for the relief plaintiffs seek in this case to intrude into executive prerogatives because the President has not authorized EO 12291 review if the Court determines that it should not be permitted.

3. _The Court has jurisdiction to grant prospective relief_.

Defendants' assertion that the Court lacks jurisdiction to grant prospective relief is based on the erroneous assumption that the Court's equitable powers are so limited as to render the Court powerless to prevent a repetition of illegal conduct. Defendants maintain that regardless of how likely it is that OMB will continue its illegal conduct, the Court must wait until each individual deadline has been missed and then the Court's only remedy is to specify a new deadline for EPA to meet. This argument ignores the breadth of the Court's equitable powers, as discussed above, and effectively would foreclose a court from ever issuing an injunction.

Defendants argue erroneously that this Court lacks jurisdiction to grant relief with respect to other RCRA regulations subject to deadlines because plaintiffs have not suffered injury-in-fact until the deadlines have been missed. Def. Mem., at 21. However, defendants ignore their public admissions that they will miss a significant number of the deadlines in the 1984 Amendments, many of which expire in less than two months. See infra, at 36-37 . Defendants also ignore the long-standing and program-wide interest of plaintiff Environmental Defense Fund ("EDF") in the RCRA program. As the U.S. Court of Appeals for the D.C. Circuit has noted:

> "EDF is a nationally based not-for-profit public interest corporation formed to promote the protection of human health and the environment. EDF has indicated in its briefs and in other litigation [footnote citing eight other cases involving EDF] an interest in the promulgation and implementation of regulations that extends beyond the permitting policy for incinerators and storage impoundments. Because of the breadth of its interest, EDF is likely to be a party to any future dispute which involves a similar principle." Environmental Defense Fund v. Gorsuch, 713 F.2d 802, 811 (D.C. Cir. 1983).

Indeed, most of the RCRA regulations in effect today were promulgated as a result of a deadline lawsuit initiated by EDF and others in 1978. See

Illinois v. Costle, 12 ERC 1597 (D.D.C. 1979); Illinois v. Gorsuch, 530 F. Supp. 340, 341 (D.D.C. 1981), aff'd as modified, 684 F.2d 1032 (D.C. Cir. 1982).[17]

Defendants' argument that prospective relief is barred because future violations are not ripe for review and would require hypothetical relief ignores the fact that defendants have conceded that OMB will continue to use EO 12291 to review regulations beyond statutory deadlines. In response to Plaintiffs' Statement of Material Facts, defendants state only that OMB will not "unjustifiably" delay promulgation of regulations subject to statutory deadlines in the future. Defendants' Objections to Plaintiffs' Statement of Material Facts, para. 8. It also ignores the fact that the legal question posed would be identical in every case: whether OMB has the authority to delay promulgation of regulations beyond a statutory deadline in order to complete EO 12291 review. Considerations of judicial economy clearly dictate that this issue be resolved in this case in a manner that would avoid the need for a multiplicity of lawsuits in the future.

4. Respect for a coordinate branch of government militates in favor of granting plaintiffs the relief they seek.

Defendants also argue that even if plaintiffs are entitled to relief against both OMB and EPA, the Court should exercise its "remedial discretion to withhold relief where respect for coordinate branch of government counsels judicial restraint." Def. Mem., at 22. Contrary to defendants' claim, the principle of respect for a coordinate branch of government actually militates in favor of granting plaintiffs the relief they seek.

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[17] Defendants are well aware of plaintiff EDF's programmatic interest in the implementation of RCRA, as reflected by discussions between EPA and OMB that anticipated that EDF would file this lawsuit even before it was instituted. SA-10, at 3.

As noted in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Summary Judgment, this case involves an attempt by executive agencies to contravene the clearly expressed will of Congress. Pl. Mem., at 17-20. A constitutional system of government based on a separation of powers between coordinate branches of government requires judicial vigilance to ensure that the "equilibrium established by our constitutional system" is not undermined through actions by one branch of government to arrogate powers belonging to another. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, J., concurring). The Supreme Court has recently reaffirmed the importance of this principle. Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983). Yet defendants in this case are insisting that the executive agencies should have complete discretion to decide for themselves whether or not to obey the express commands of Congress.

This case does not involve a dispute between two executive agencies, but rather the joint actions of two executive agencies to defy the commands of Congress to plaintiffs' detriment. To allow executive agencies to ignore clear directives from the legislative branch simply because they deem such action "justifiable" would seriously undermine the principle of separation of powers between coordinate branches of government. Plaintiffs are not asking the Court to meddle in the internal affairs of executive agencies, but rather to require executive agencies to conform their actions to clear legislative directives. If an executive agency is free to ignore the will of Congress simply because of its own preference or the preference of another executive agency, then there is no check on the extent to which the executive may expand its powers in excess of those granted by Article II of the Constitution. Thus, rather than withholding relief out of respect for the executive branch, it is essential that the Court grant the relief plaintiffs seek out of respect for Congress and for the separation of powers that is at the heart of our constitutional system of government.

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

As plaintiffs have noted throughout this litigation, defendants cannot be granted summary judgment under any set of circumstances because they cannot satisfy the requirement of Rule 56 that the moving party be "entitled to judgment as a matter of law." Although defendants characterize their willingness to consent to a judgment against EPA imposing a June 30, 1986 promulgation deadline as a motion for summary judgment in their favor, such a judgment would in fact be a judgment against them, holding EPA liable for its admitted failure to perform a non-discretionary duty. Because no party has a legal entitlement to judgment against itself given the "cases or controversies" requirement of Article III, sec. 2 of the Constitution, defendants are not entitled to judgment as a matter of law. See Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, at 14-16. Thus defendants' motion for summary judgment must be denied. Bloomgarden v. Cover, 479 F.2d 866 (D.C. Cir. 1973).

In response to plaintiffs' argument that defendants are not entitled to judgment as a matter of law, defendants state only that Article III does not limit defendants' ability "to propose an appropriate schedule for promulgation of a regulation when a statutory deadline has been missed." Def. Mem., at 34-35. They note that the government frequently has proposed schedules in deadline cases. However, while the government may propose a remedy for its conceded violation of the law, this does not mean that the government is entitled to judgment in its favor even if the Court ultimately chooses to adopt the remedy proposed by the government. Thus, even if the Court were to

ıs. Defendants' Memorandum at 37-38, Bedell
her hand, defendants state the Executive Order
y with its procedural mandates to the extent
leadline. Defendants' Memorandum at 39-40.
defendants ultimately choose, OMB has no legal
the satisfaction of Congressional mandates for

ıck of authority, defendants request this Court to
of the final permitting standards because OMB and
ınt" that OMB review will not take longer than
l thus will not delay the final promulgation date.
dell Declaration at 17, Def. Mem. at 42.
ruly have no intention of delaying final
ıve no objection to the relief plaintiffs have
ıitting standards. Plaintiffs do not seek to bar
ınd OMB regarding the permitting standards in any
seek a prohibition on the use of Executive Order
ın for delaying or prohibiting publication of the
ted above, the essence of EO 12291 review is the
frain from publishing regulations until OMB has
an continue its "advisory and consultative" role
l review, Bedell Declaration at 3, but it cannot
elay EPA's promulgation of the regulations.[18]

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e Sierra Club v. Costle, 657 F.2d 298 (D.C.
he "necessity and lawfulness" of communications
ncies and the Presidents' delegatees. See e.g.
. Because this case involved communications prior
Order 12291, the EO 12291 review process cannot
for federal agencies to communicate with each

Plaintiffs seek a court order directed against both EPA and OMB defendants to ensure that their alleged "agreement" not to delay promulgation of the permitting standards is enforceable by this Court. As it stands now, this "agreement" is only an oral understanding between EPA's General Counsel and an unnamed lawyer in OMB's Office of General Counsel. Skinner Deposition at 73. Furthermore, this "agreement" merely limits OMB review to the length of time taken by EPA for its concurrent Red Border review. Skinner Deposition at 79-80. This is the same procedure the defendants used for the proposed permitting standards, Bedell Declaration at 9, which OMB substantially delayed. Mr. Bedell candidly admits that EPA's Red Border review typically "remains open" until OMB and others have submitted comments. Bedell Declaration, at 10. Therefore, OMB-induced delays automatically lengthen EPA's Red Border review, rendering defendants' agreement meaningless. Without a court order directed against both the EPA and OMB defendants, OMB can once again place EPA in a position of either accepting OMB changes to the final permitting standards or defying a Congressional or judicial mandate. Thus, a court order directed against both defendants is necessary to prevent a repetition of events which precipitated this litigation. As plaintiffs discuss below, defendants offer no regrets or explanations for the illegal manner in which the permitting standards rulemaking process has been handled to date. Rather they regard their behavior as exemplary, and deserving of repetition.

B. Defendants Have Engaged in a Pattern and Practice of Delaying Promulgation of Congressionally Mandated Rules, Thereby Necessitating a Court Order to Prevent a Continuance of Such Unauthorized Activity.

The Congressional mandate of Section 3004(w) of RCRA is one of a series of significant amendments to RCRA enacted by Congress last year. These amendments, embodied in the Hazardous and Solid Waste Amendments of 1984, represent both a substantial rebuff to EPA's existing regulatory policies and a command by the Congress to close regulatory loopholes and to promulgate badly needed regulations.[19] Congress regarded the disposal of hazardous wastes as a "worsening national problem", exacerbated by EPA's failure to promulgate necessary regulations. Solid Waste Disposal Act Amendments of 1983, Report of the Committee on Environment and Public Works, U.S. Senate, 98th Cong., 1st Sess., Ser. No. 98-284 (1983) at 2. A chief sponsor of the Senate HSWA bill (S. 757) described the need for the bill in this manner:

> It has become evident that a strong congressional expression of disapproval of EPA's slow and timid implementation of the existing law is necessary, as well as a clear congressional directive mandating certain bold, preventive actions by EPA which will not be taken otherwise, despite the existing, broad authorities contained in RCRA.
>
> EPA has not implemented the Resource Conservation and Recovery Act aggressively. The Agency has missed deadlines, proposed inadequate regulations, and even exacerbated the hazardous waste problem by suspending certain regulations. It has become evident that this slow, plodding course will be continued in the absence of a clear congressional directive. This is not acceptable. Accordingly, S. 757 provides more specific guidance to EPA as to how the broad grants of authority of the existing RCRA law should be used. 130 Cong. Rec. S9151 (daily ed. July 25, 1984) (statement of Senator Mitchell).

As EPA admits, HSWA is a "major new statute that will require profound changes in the way that this country manages hazardous waste." 50 Fed. Reg. 28702 (July 15, 1985). Furthermore, these changes are "all the more significant" because of the "ambitious" schedule Congress has established for achieving them.[20] The question in this case is whether the defendants are free to invoke the Executive Order 12291 review process as justification to delay promulgation of mandated regulations beyond statutory deadlines in defiance of clear congressional directives.

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[19] See House HSWA Report at 19-20, reprinted in 1984 U.S. Code Cong. & Admin. News 5577-78.

It is an undisputed fact that there are many deadlines for EPA action in HSWA, and many occur within the first two years after enactment, or by November 8, 1986. Skinner Declaration at 3; McGraw Declaration at 2. It is also clear that EPA will not meet these deadlines in a substantial number of cases, as indicated by a recent EPA letter to the Senate Environment and Public Works Committee (PA-21), the Skinner Deposition (pp. 93-100), and EPA's most recent Regulatory Agenda published in the October 29, 1985 Federal Register.[21] These documents reveal EPA has already determined it will not meet the following congressional mandates:

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20. Id. Defendants make much ado over the four months provided by Congress to promulgate the final permitting standards. Defendants' Memorandum at 4. However, this deadline was based on EPA's own schedule for issuing the standards published in its fall 1983 Regulatory Agenda, and EPA never explains why it did not meet its own schedule or why Congress should have ignored the prior EPA schedule. These incessant and unexplained EPA delays demonstrate why Congress increasingly must rely on statutory deadlines.

21. 50 Fed. Reg. 44644. Defendants statement on page 4 of its Memorandum that plaintiffs "have not even made an attempt to show" which RCRA deadlines EPA will miss is a complete misrepresentation of the facts. See Pl. Mem., at 34-35 (citing the Senate letter and the Skinner Deposition).

Regulation	RCRA Authority	RCRA Deadline	Current EPA Schedule
1. Containerized Liquids in Land-Fills Minimization Requirements	Sec. 3004(c)(2)	Feb. 1986	"Early 1987"
2. Listing of Dimethyl Hydrazine	Sec. 3001(e)(2)	Feb. 1986	April 1986
3. Listing of Carbamates	Sec. 3001(e)(2)	Feb. 1986	April 1986
4. Listing of Linuron and Bromacil	Sec. 3001(e)(2)	Feb. 1986	Aug. 1986
5. Listing of Petroleum Refinery Wastes	Sec. 3001(e)(2)	Feb. 1986	Sept.1987
6. Hazardous Waste Export Requirements	Sec. 3017	Nov. 1985	May 1986
7. Air Emissions Regulations	Sec. 3004(n)	May 1987	"Mid 1988"
8. Listing of dyes and pigments, coke by-products, and inorangic chemical wastes	Sec. 3001(e)(2)	Feb. 1986	Proposals only in "Mid 1986 - Early 1987"

Sources:

(1) PA-21 at 4; (2) 50 Fed. Reg. 44679 (Oct. 29, 1985); (3) Id. at 44678; (4) Id. at 44679; (5) Id.; (6) Id. This belated schedule assumed a November 1985 proposal which never materialized. (7) PA-21 at 4. The latest Regulatory Agenda did not even include a date for proposal of these rules. See 50 Fed. Reg. 44678 (October 29, 1985). (8) PA-21 at 4. EPA erroneously considers the publication of a proposed rule as sufficient to satisfy its statutory mandate. See PA-21 at 2, Skinner Deposition at 97-99.

Despite these impending statutory violations, defendants have allotted time for Executive Order review of both the proposed and final regulations. Skinner deposition at 96. These proposed and final regulations await the same fate as the proposed Section 3004(w) permitting standards. OMB's interference with the publication of the proposed permitting standards was based in large part on policy views with respect to the entire RCRA program. See SA-8, SA-10, SA-12.

Indeed, defendants regard OMB's behavior in March through June of 1985 as worthy of repetition, as an example of "high priority" and "very diligent" review. Defendants' Memorandum at 5-6. Defendants believe the overwhelming evidence plaintiffs have submitted regarding OMB interference is also an indication that OMB gave this rule an unusual amount of attention and sought to expedite matters. Id. They offer the proposed permitting standards as an example of how the Executive Order review process should work. Bedell Declaraton at 9-10.

Contrary to defendants' assertions, however, the review process for the permitting standards at OMB was anything but expeditious. For non-major rules, the process should take 10 days. However, the proposal was at OMB for two weeks before OMB was even briefed on it. PA-2. Moreover, OMB waited six weeks before transmitting its initial substantive response on the proposal to EPA. SA-3. By that time, the persons at EPA participating in Red Border Review had submitted their comments weeks before. Skinner Deposition at 71-72, Bedell Declaration, at 10. The EO 12291 review process required over three months to complete.

More importantly, however, assuming arguendo that OMB gave the proposal a "diligent" review, this is still no justification for delaying publication of the proposal. In effect, defendants argue that they can ignore a Congressional mandate, as long as they determine the manner in which is done is "justifiable". Defendants seek an "accommodation" between Executive Order 12291 and statutory deadlines, and argue they achieved such an accommodation in the instant case and with respect to other EPA regulations subject to deadlines. Bedell Declaration at 8-17.

In support of its summary judgment motion, plaintiffs submitted to the Court numerous examples of OMB-induced delays in EPA rulemaking where the statutory or judicial deadlines have passed. These examples involve rules required by the Clean Air Act, Clean Water Act and the Safe Drinking Water Act. See Plaintiffs Memorandum at 27-8. These facts remain uncontested.

In response, defendants rely solely on the Bedell Declaration which purports to demonstrate OMB review does not significantly delay rules. Bedell Declaration, par. 20-25. As stated above, however, the average review statistics in paragraphs 20-22 are irrelevant because they predominantly involve insignificant rules and rules not subject to statutory or judicial deadline. The only EPA rules subject to deadlines Mr. Bedell analyzes are Clean Air Act rules. Here again Mr. Bedell relies on average review periods, thereby grouping many rules of localized significance such as State Implementation Plan (SIP) approvals, with regulations of national importance. See PA-13, Section labeled Clean Air Act. Even so, OMB's own data indicates a 59-day "average" review period for regulations where the statutory deadline has already passed, as compared to the 10-day period provided in the Executive Order for non-major rules. Bedell Declaration, par. 24. Furthermore, Mr. Bedell admitted OMB held up at least one rule as the statutory deadline expired. Id.

Significantly, Mr. Bedell does not mention that in a large number of cases OMB "completed" its review by prohibiting the publication of the rule, thereby causing substantial delays in final promulgation. See pp. 12-13 supra. He also does not mention three regulations OMB is currently holding despite statutory deadlines. Appendix A to this Memorandum is a copy of "OMB Extended Reviews" prepared by EPA's Office of Policy, Planning and Evaluation for the week of December 6, 1985. It indicates OMB has been reviewing arsenic standards since February 19, 1985 despite a January 7, 1984 statutory deadline;[22] new source performance standards (NSPS) for sewage treatment plants since March 19, 1985 despite a November 27, 1983 statutory deadline; and NSPS for volatile liquid storage (VOL) since August 19, 1985 despite a statutory deadline of August 7, 1982.

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[22] Defendants have repeatedly ignored congressional mandates with respect to these standards. See New York v. Gorsuch. 554 F. Supp. 1060 (S.D.N.Y. 1983).

Defendants' characterization of this behavior as "accommodation" underscores the need for the relief plaintiffs seek in this case. Without a court order prohibiting similar behavior for the RCRA rules, the intent of Congress manifested in HSWA will be thwarted by unauthorized and unilateral decisions to hold up or reject mandated regulations.[23/] The Court should note that while OMB has "agreed" not to delay promulgation of the Section 3004(w) permitting standards, OMB has not made similar representations with respect to the remaining RCRA rules subject to statutory deadlines. Bedell Declaration, at 17.

C. Plaintiffs' Proposed April 25, 1986 Promulgation Date Can Be Met.

In support of its Motion for Summary Judgment, plaintiffs submitted to this Court documents prepared by EPA, and the Deposition of John Skinner, the former Director of EPA's Office of Solid Waste, which demonstrated that EPA's suggested June 30, 1986 promulgation date for the Section 3004(w) permitting standards was not expeditious. In his deposition, Dr. Skinner indicated the elimination of Steering Committee Review, as defendants propose, should have reduced the promulgation schedule by two months, but no such savings appear upon comparing prior EPA promulgation schedules with the schedule currently proposed. See Pl. Mem., at 39-40. These facts remain uncontested. See Def. Mem., at 32-33. Plaintiffs note that EPA's Weekly Activities Report dated October 17, 1985 also contains a schedule culminating in the transmission of

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23. Defendants candidly admit that in the absence of a court order, OMB will require compliance with the Executive Order unless it is "impracticable" to do so. Def. Mem., at 40. The defendants never explain when review would be "impracticable" as they define it.

the final standards to the Federal Register by May 1, 1986. PA-26 (Workplan Tracking System ATS Weekly Status Summary Attachments for ATS:020).

In addition, plaintiffs submitted excerpts from the Skinner Deposition which established that defendants' proposed scheduled assumed the need to evalute and respond to public comments of extraordinary length and complexity. However, as the Declaration of Susan Egan demonstrates, the public has not responded as EPA anticipated. See Pl. Mem., at 40-41. Defendants do not challenge the Egan Declaration, but still maintain the permitting standards are "highly controversial" and review of the comments requires "substantial review and analysis". See Def. Mem., at 30-31.

Finally, plaintiffs submitted excerpts from the Skinner deposition which demonstrated that he regarded the rulemaking concerning small quantity generators mandated by Section 3001(d) of RCRA as comparable to the Section 3004(w) tank standards in its importance and complexity. Yet EPA requires four months less time to issue the small generator rules than the tank standards. See Pl. Mem., at 41-42. Defendants do not challenge that their witness considered the rules comparable or that the small quantity generator rules will be issued on a more expedited schedule that the tank standards. Rather, defendants attempt to discredit their witness by arguing the rules are not comparable after all. See Def. Mem., at 33-34.

In an attempt to obfuscate these undisputed facts supporting plaintiffs proposed April 25, 1986 promulgation date, defendants have submitted three additional Declarations from EPA employees. Only one of the EPA employees actually works on the tanks standards, William Kline, and his declaration purports to buttress prior EPA conclusory statements that the June 30, 1986 date defendants propose is an "ambitious" one because six significant issues still need to be resolved.[24] Def. Mem., at 30-31, Kline Declaration at 5-8. According to the defendants, the Kline Declaration indicates EPA must perform additional data-gathering and technical analyses to resolve these issues before the final rule can be issued. Defendants' Memorandum at 31. However, a careful reading of the Kline Declaration reveals that in most cases Mr. Kline has not concluded additional data gathering and analyses will need to be performed. With respect to tank leak testing, Mr. Kline states "there may be a need to gather additional data or alter the regulatory strategy in regard to leak testing". Kline Declaration at 6. Regarding 90-day accumulation tanks, he states "I believe the Agency may need to consider whether to change its regulatory strategy in regard to 90-day accumulation tanks". Id. at 8. Similarly, there "may be a need to re-examine" the proposal for non-liquid waste tanks. Id. Furthermore, Mr. Kline does not anticipate the need for additional data or analysis regarding the scope of the rule. Id. For only one issue (secondary containment for ancillary equipment) does Mr. Kline indicate he "expects" to gather additional information, id. at 7, and he does not indicate how much time, if any, this will require. Defendants' characterization of the Kline Declaration is both a worst case assumption and grossly misleading.

The McGraw and Axelrad declarations are intended to contradict Dr. Skinner's assertion that the tank standards and the small generator rules are comparable. Essentially, these Declarations state the small quantity rules are simpler to promulgate because they will not establish new technical standards for the regulated community, but rather will apply already issued standards to additional persons. Axelrad Declaration at 2, McGraw Declaration at 4-5. However, neither EPA employees mentioned that the Agency specifically solicited suggestions on new or "tailored" technical standards for facilities handling waste from small quantity generators in its August 1, 1985 proposal. See 50 Fed. Reg. 31299, 31300 (August 1, 1985). Thus, the small quantity generator rules promulgation schedule must have included time for an evaluation and analysis of comments on technical standards, even if EPA has now chosen to reject those comments. Dr. Skinner's comparison of the tank standards and small quantity generator rules remains valid; the principal difference appears that regarding the latter rules the Agency is more willing to make the policy decisions required for final promulgation.

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[24] Ironically, one of the six issues concerns the risk assessment demanded by OMB as a condition of clearing the proposed rule for publication. See PA-6. Defendants have previously indicated that performance of the risk assessment should not delay the rulemaking process. Skinner Declaration at 8. Now they argue the risk assessment is an important reason the rulemaking process cannot be expedited, due to "experienced delays". Kline Declaration at 6. These delays demonstrate the continuing effects of OMB interference with the tank standards.

The permitting standards for underground tanks are important regulations. As defendants acknowledge, 40% of the underground tanks in operation are leaking. See Kline Declaration at 5. Yet, in the absence of permitting standards, tank owner/operators are under no regulatory obligation to determine if their tanks are leaking, monitor the releases into the groundwater, or clean up releases which threaten human health and the environment. Standards for underground tanks should have been issued in April 1978. EPA solicited public comments on these tanks in December 1978 (43 Fed. Reg. 58988 — the proposal applied to all storage tanks) and again in January 1981 (46 Fed. Reg. 2831), but never issued final standards. The March 1, 1985 deadline enacted by Congress in 1984 was to ensure there would be no further delay in promulgating the required standards. 129 Cong. Rec. H9167 (November 3, 1983). Even plaintiffs' April 25, 1986 proposed promulgation date represents a delay of almost 14 months from the

Congressional deadline established in 1984, and eight years from the original deadline established in 1976.

As other courts in the Circuit have noted, EPA cannot displace congressional mandates for timely action with its own judgment of when promulgation would be desirable.[25] *State of New York v. Ruckelshaus*, 21 ERC 1721 (D.D.C. 1984); *Natural Resources Defense Council v. Ruckelshaus*, 14 ELR 20817 (D.D.C. 1984); *Sierra Club v. EPA*, 719 F.2d 436, 469-470 (D.C. Cir. 1983). The short deadline in HSWA indicates Congress did not expect defendants to resolve every potential problem before promulgating the final standards. *State of Illinois v. Gorsuch*, 530 F. Supp. 340, 341 (D.D.C. 1981), *aff'd sub nom. Citizens for a Better Environment v. Gorsuch*, 684 F. 2d 1032 (D.C. Cir 1982); *State of New York v. Ruckelshaus*, *supra* at 1723. Since defendants present only conclusory statements, and speculation by Mr. Kline as to what *might* be required to promulgate the permitting standards in support of its June 30, 1986 promulgation date, defendants have failed to meet their heavy burden of showing an earlier promulgation date is impossible. *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1979).[26]

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[25] Courts in other Circuits have also rejected proposed EPA schedules as too lengthy and contrary to congressional intent. See *Sierra Club v. Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982); *Sierra Club v. Ruckelshaus*, 602 F. Supp. 892 (N.D. Cal. 1984); *State of New York v. Gorsuch*, 554 F. Supp. 1060 (S.D.N.Y. 1983).

[26] Of course, should it actually become impossible to issue the permitting standards by April 25, 1986, defendants would be free to seek a modification of the Court's order at that time.

V. CONCLUSION

For the foregoing reasons, the Court should grant plaintiffs' motion for summary judgment and deny defendants' supplemental motion for summary judgment.

Respectfully submitted,

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December 23, 1985

-

NSPS for VOL Storage

Sent: 8/19/85
Extended: 8/29/85

NSPS for Kraft Pulp Mills

Sent: 10/24/85
Extended: 11/7/85

NSPS for Petroleum
Wastewater

Sent: 11/5/85
Extended: 11/14/85

Water Program

State Sludge Management
Program Regulations

Sent: 4/24/85
Extended: 5/30/85

Pesticides and Toxics Program

Child Resistant Packaging Requirements

Sent: 8/19/85
Extended: 9/6/85

Mesityl Oxide:. Test Rule and Test Standards

Sent: 10/25/85
Extended: 11/8/85

Solid Waste Program

State Authorization Under RCRA

Sent: 8/21/85
Extended: OMB failed to respond.

RCRA Land Ban Rule

Sent: 11/19/85
Extended: OMB failed to respond

RCRA Corrective Action at Federal Facilities

Sent: 11/19/85
Extended: OMB failed to respond

General

General Regulation for Assistance Programs

Sent: 9/12/85
Extended: 9/26/85

SECTION THREE: CLEARANCES

OMB did not clear any extended documents this week.

APPENDIX B. EXAMPLES OF CLEAN AIR ACT NEW SOURCE PERFORMANCE STANDARDS HELD OR DISAPPROVED BY OMB WHILE STATUTORY DEADLINE EXPIRED

Standard	Date Submitted to OMB	Statutory Deadline	Date OMB Completed Review
Rubber Tire Manufacturing	5/24/82 (P)	8/7/82 (F)	12/13/82 (P)
	4/8/85 (F)		9/16/85 (F)
Beverage Can Containers	12/16/81 (F)	8/7/82 (F)	7/23/82 (F) Disapproved
	5/20/82 (F)		
	7/19/83 (F)		7/28/83 (F)
Large Appliance Coating	5/20/82 (F)	8/7/82 (F)	10/5/82 (F)
Stationary Internal Combustion Engines	6/29/81 (F)	8/7/82 (F)	Disapproved
	11/3/82 (F)		Disapproved
Publication Rotogravure	5/19/82 (F)	8/7/82 (F)	10/5/82 (F)
Metal Coil Coating	5/17/81 (F)	8/7/82 (F)	10/5/82 (F)

SOURCES: Attachment G to EPA's Response to Interrogatory #10; Attachment A to EPA's Response to Interrogatory #12; Olson, supra, at 70 n.366.

(P) = Proposed Rule

(F) = Final Rule

THE QUIET SHIFT OF POWER: OFFICE OF MANAGEMENT & BUDGET SUPERVISION OF ENVIRONMENTAL PROTECTION AGENCY RULEMAKING UNDER EXECUTIVE ORDER 12,291

Erik D. Olson[*]

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[*] U.S. Environmental Protection Agency, Office of General Counsel. J.D., 1984, University of Virginia School of Law; A.B., Columbia University, 1981. All views expressed in this article are solely the author's, and should not be attributed to EPA or to any other EPA employee. The author's research was completed prior to his employment with EPA, and therefore was not advantaged by any special knowledge of the OMB review process not available to outside researchers.

This study was supported in part by a National Conservation Fellowship from the National Wildlife Federation. The author expresses his appreciation to Dean Richard A. Merrill, William Pedersen, Charles Holtman and many unnamed reviewers for their critiques of earlier drafts of this study. Any errors are the author's.

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When President Reagan signed Executive Order 12,291,[1] a simmering controversy over whether, and under what conditions, the President has the authority to supervise executive agency rulemaking[2] took on new significance. The Order delegates to the Office of

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[1] 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 note (1982) [cited hereinafter as E.O. 12,291]. The Order was signed on February 17, 1981.

[2] The constitutionality of, statutory limits upon, and need for presidential (or other executive branch) review of rulemaking have been debated heatedly by commentators. *See, e.g.*, ABA Comm'n on Law and the Economy, Federal Regulation: Roads to Reform (1979) (arguing that procedurally limited presidential review of a handful of major rules each year would be desirable); Bernstein, *The Presidential Role in Administrative Rulemaking: Improving Policy Directives: One Vote for Not Tying the President's Hands*, 56 Tul. L. Rev. 818 (1982) (suggesting that while "the potential for abuse certainly exists," the President and a few senior White House aides should be able to participate freely in those rulemakings where Congress has left "flexibility for the accomodation of competing goals"); Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451 (1979) (arguing for presidential involvement, identifying possible constitutional and other more vague boundaries of permissible presidential intervention, and suggesting that the Supreme Court adopt a "more flexible" approach to separation of powers analysis with regard to presidential initiatives); Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395 (1975) (contending that presidential control of regulatory agency activity is necessary under the practical and political realities of government); Davis, *Presidential Control of Rulemaking*, 56 Tul. L. Rev. 849 (1982) (arguing that the real issue is not whether the President may intervene in executive agency rulemaking ["of course he may"], but rather how such intervention should be procedurally limited to eliminate the "harmful element" of secrecy and undue displacement of agency statutory authority); Morrison, *Presidential Intervention in Informal Rulemaking: Striking the Proper Balance*, 56 Tul. L. Rev. 879 (1982) (asserting that there are few, if any, constitutional limits on Congress' power to circumscribe the President's role in informal rulemaking, and that Congress should declare that the President and White House staff be treated "just like anyone else"); Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 Mich. L. Rev. 193 (1981) (arguing, *inter alia*, that available evidence demonstrates Congress' intent to deny the President substantive control over administrative policymaking, and that the Order "exceeds the proper bounds of Presidential authority"); Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order 12,291*, 23 Ariz. L. Rev. 1235 (1981) (rebutting Rosenberg's arguments, despite a "decidedly agnostic" view of the substantive requirements of E.O. 12,291); Sunstein, *Cost-Benefit Analysis and the Separation of Powers*, 23 Ariz. L. Rev. 1267 (1982) (concluding that to avoid serious separation of powers problems, the cost-benefit requirement of E.O. 12,291 should be applied only to rules adopted under statutes designed to remedy market failures in an economic setting or to those that have efficiency-promoting applications not in conflict with the legislative purpose); Zamir, *Administrative Control of Administrative Action*, 56 Calif. L. Rev. 866 (1969) (arguing that, in general, an administrative superior such as the President may control his subordinates' actions); Zamir, *Administrative Control of Administrative Action: The Exceptions*, 51 N.Y.U.L. Rev. 587 (1976) (noting several statutory and judicially created exceptions to the general rule that an administrative superior may control the actions of his subordinates, such as in quasi-judicial proceedings); Comment, *Capitalizing on a Congressional Void: Executive Order 12,291*, 31 Am. U.L. Rev. 613 (1981) (arguing that the legal basis for E.O. 12,291 is sufficient, that the Order may promote accountability in administrative decisionmaking, and that Congress should codify effective presidential review); Note, *Delegation and Regulatory Reform: Letting the President*

Management and Budget (OMB) the authority to ensure, "to the extent permitted by law," that all informal executive agency rules conform to certain broad economic principles: that they be based on adequate information, that their benefits outweigh their costs, and that aggregate net benefits to society be maximized.[3]

For more than four years, OMB quietly has been reviewing all proposed and final informal executive agency rules—and certain other agency actions—to verify their conformity with administration policies. This article is the result of a comprehensive study of how OMB has conducted its review of Environmental Protection Agency (EPA) rules under the Reagan Executive Order.

Section I describes the institutional origin of E.O. 12,291. It notes the broad array of OMB powers which, together with the new Executive Order, give the Office substantial leverage over EPA policy and rulemaking.

Section II addresses legal and policy questions raised by OMB review. First, to what extent may the President or OMB control EPA rulemaking consistent with the Constitution and applicable statutes? Second, may non-statutory considerations, particularly economic costs and benefits, properly be engrafted onto agency decisionmaking? Third, what are the legal strictures on ex parte contacts between OMB and outside parties, and between OMB and EPA?

Section III observes how OMB reviews EPA rules under E.O. 12,291. This section describes the resulting shift in the locus of administrative power, and highlights many of the practical concerns arising from a President's attempt to use OMB to impress his will upon the executive branch. The Executive Order has effectively infused OMB input into much of EPA decisionmaking, with OMB in some cases exercising a de facto veto over EPA rules. Secrecy pervades virtually all of OMB review, and undisclosed industry lobbying of OMB in some cases appears to influence OMB's positions on EPA rules under review.

Change the Rules, 89 Yale L.J. 561 (1980) (contending that the task of reconciling balance, accountability, and regulatory effectiveness should be congressionally delegated to someone other than the President); R. Rauch, Re: Legal restrictions on Presidential Interference in EPA Rulemaking (Sept. 5, 1978, memorandum), *reprinted in Executive Branch Review of Environmental Regulations: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 96th Cong., 1st Sess. 191-230 (1979) (arguing that presidential control of EPA rulemaking is an unconstitutional usurpation of Congress' legislative power) [hearings hereinafter cited as *Hearings on Executive Review*].

[3] E.O. 12,291, *supra* note 1, § 2.

The article concludes that if regulatory review is to increase bureaucratic accountability and provide more reasoned decisionmaking, the courts and Congress must act. First, any regulatory review process should be required to be on the public record, in accordance with the policies underlying the Administrative Procedure Act. Second, if a regulatory review process is desired, OMB, because of its institutional anti-regulatory bias, lack of staff and expertise, broad array of ancillary powers, and propensity for secrecy, should not be the reviewer. Instead, a separate review group should be established to comment, on the record, and to raise disagreements with the agency for presidential review and resolution, where such presidential review is permitted by the relevant statute. Third, rules to which cost considerations are irrelevant according to statute should be explicitly exempted from review. Finally, the review authority must not be permitted to displace the agency in reaching rulemaking decisions.

Because of executive branch sensitivity to the issue of OMB review under E.O. 12,291, several cited sources of information within OMB and EPA have requested anonymity.

I. STATUTORY AND EXECUTIVE GRANTS OF AUTHORITY TO OMB

The Office of Management and Budget is probably the most powerful agency in the federal government. Because of the Office's carefully maintained low profile, however, the public generally is unaware of OMB's influence on federal policy.[4] A wide array of powers has made OMB an influential, near omnipresent force within the executive branch.

A. *OMB's Synergistic Powers*

While a comprehensive discussion of the powers of OMB is beyond the scope of this article,[5] it is important to note the breadth of OMB's reach within the federal government. As one former OMB official noted, "The Government works using three things: money, people, and regulations; the agency must get all three through OMB."[6]

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[4] An in-depth study of OMB's power by the Congressional Research Service concluded: "Although it is often called the most powerful agency in the United States Government, the Office of Management and Budget remains somewhat mysterious to Congress and the public [because] OMB generally goes about its work quietly, outside the spotlight." J. Parris, Congressional Research Service, The Office of Management and Budget: Background, Responsibilities, Recent Issues i (1978) [hereinafter cited as CRS Study of OMB].

See also House Gov't Operations Comm., Budget and Accounting: Appointments-Offices, H.R. Rep. No. 697, 93d Cong., 1st Sess. (1973) (to accompany H.R. 11,137), *reprinted in* 1974 U.S. Code Cong. & Ad. News 2778, 2783 ("Next to the President, the [OMB] Director is the most powerful person in the Executive Branch.") [hereinafter cited as H.R. Rep. No. 697].

The power of OMB over agency budgets is perhaps its best-known tool for influencing agency policy. Administrators of programs that OMB dislikes must fight vigorously to survive OMB budget review. OMB also has significant influence on agency personnel ceilings that in part determine agency resources and manpower.[7]

Contributing to OMB's power is its location in the Executive Office of the President. This vantage point gives it close ties to the White House, and substantial political clout.[8]

A third source of OMB influence is its administration of the Paperwork Reduction Act.[9] Enacted during the Carter Administration, this Act's seemingly innocuous mandate that any agency information-gathering effort must bear the OMB imprimatur "allows OMB to get at a lot of rules."[10] Even a cursory survey of the comments filed in OMB's Paperwork public docket reveals that industries are keenly aware of OMB's power to bottle up EPA programs by denying paperwork requests.[11]

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[5] CRS Study of OMB, *supra* note 4, is an excellent although somewhat dated study of the broad powers of OMB.

[6] Interview with Jim Tozzi, former OMB, Office of Information and Regulatory Affairs (OIRA) Deputy Adm'r, in Washington, D.C. (June 14, 1983).

[7] The EPA noise pollution control program's demise illustrates the fate of a program unpopular with OMB. An April 1981 OMB critique of EPA argued: "There is serious question of whether noise is an appropriate area for EPA regulation." OMB Critique of EPA Programs (internal OMB memo), *summarized in* Inside EPA: Special Report (Inside Wash. Pubs.) 1 (April 24, 1981). (The OMB memo fails to note that Congress explicitly has directed the EPA Administrator to control noise pollution in the Noise Control Act of 1972. 42 U.S.C. §§ 4901-4918 (1982).) Shortly thereafter, EPA's FY 1983 budget passback from OMB showed a complete elimination of the noise program's operating budget. *See EPA Takes Major Hit in FY-83, Purchasing Power Halved, 2,000 in Staff Cuts,* Inside EPA (Inside Wash. Pubs.) 1 (Oct. 2, 1981).

[8] *See* CRS Study of OMB, *supra* note 4; *see also* EPA "Issue Alerts" (1981-83) (series of memoranda from EPA Administrator to White House, citing OMB clearance of Agency actions as apparent litmus test of their political acceptability) (on file with author).

[9] 44 U.S.C. §§ 3501-3520 (1982).

[10] Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983). *Sub rosa* attacks on rules through the Paperwork Act probably are impermissible. ~~*See* 44~~ U.S.C. § 3518(e) (Act shall not increase OMB's authority with respect to ~~agency substantive~~ policy); *see infra* ~~note~~ 83 (noting that the Act was not ~~intended to be~~ a substantive regulatory reform bill).

[11] *See, e.g.*, OMB Paperwork Docket, 2,000 Series (located in New Executive Office Bldg.,

A host of other powers has been vested in OMB,[19] ranging from the Office's authority to review executive agency testimony

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Third Floor, Washington, D.C.) (*see especially* Hazardous Waste Reporting Requirements Forms).

OMB has been severely criticized by the General Accounting Office (GAO) for diverging from the intended goals of the Paperwork Reduction Act, and instead emphasizing regulatory relief. *See* GAO, Implementing the Paperwork Reduction Act: Some Progress, But Many Problems Remain (1983).

OMB's Paperwork Act implementation is reviewed in detail in *Oversight of the Paperwork Reduction Act of 1980: Hearing Before the Subcomm. on Information Mgmt. and Regulatory Affairs of the Senate Comm. on Govtl. Affairs, 98th Cong., 1st Sess. (1983)* (*see especially* Responses of OIRA to written questions submitted by Senator Levin, *id.* at 65).

[19] OMB tools to influence agency rules include:

a) OMB's role as a reviewer of agencies' Regulatory Flexibility Analyses, which analyze the impacts of new rules on small business. *See* Regulatory Flexibility Act, 5 U.S.C. §§ 601-612 (1982); *see generally* Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 Duke L.J. 213 (1982).

b) OMB's traditional role as informal moderator of interagency disputes. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

c) OMB's power to review, edit, and approve or disapprove of all executive agency testimony before Congress regarding any proposed spending or enrolled legislation. *See* OMB, Revision of Circular No. A-19, Revised, Dated July 31, 1972: Legislative Coordination and Clearance (Sept. 20, 1979) (memorandum to the Heads of Executive Departments and Establishments) (available in Executive Office of the President (EOP) Library, 1st Floor, New Executive Office Bldg., Washington, D.C.) [hereinafter cited as OMB Circular A-19].

d) OMB's review power over all legislative proposals from executive agencies. *Id.*

e) OMB's review power over all proposed Executive Orders and Proclamations. *See* OMB, Memorandum to Heads of Executive Departments and Establishments: Proposed Executive Orders and Proclamations (M-81-6) (March 9, 1981) (signed by David A. Stockman) (available in EOP Library) [hereinafter cited as OMB Memo on Proposed Executive Orders].

f) OMB's former role as coordinator of reorganizations in executive agencies. *See* CRS Study of OMB, *supra* note 4, at 62-66. The Reorganization Act, 5 U.S.C. §§ 901-912 (1982), expired on April 7, 1981, meaning that no reorganization plan may go forward until the Act is extended. *Id.* § 905(b); *see* H.R. Rep. No. 128, 98th Cong., 1st Sess. (1983).

g) OMB's role as coordinator of administrative and management reforms in executive agencies. *See* CRS Study of OMB, *supra* note 4, at 50.

h) OMB's power to issue "circulars" and memoranda "to the Heads of Executive Departments and Agencies" on topics ranging from submission of procurement policies to establishment of employment ceilings. *See* OMB, Revised Table of Contents and Index for OMB Circulars and Federal Management Circulars under OMB Jurisdiction (M-82-8) (Sept. 21, 1982) (listing OMB Circulars in effect) (available in EOP Library).

i) OMB's emerging role as a promoter and broker of international deregulation efforts. *See* J. Tozzi, Linking Domestic Regulatory Relief with International Regulatory Relief: A Report to the Task Force (March 10, 1983, memorandum) (on file with author).

presented before Congress,[13] proposed bills,[14] and proposed executive orders,[15] to its power, pursuant to the Antideficiency Act,[16] to reapportion agency funds.

In sum, the Office has many arrows in its quiver other than E.O. 12,291. These powers enable OMB to exert broad and powerful influence upon agency decisionmaking.[17]

B. Executive Order 12,291

1. The Roots of the Reagan Executive Order

For several decades, some students of the administrative process have argued for greater accountability and presidential review of the activities of federal regulatory agencies. Others have suggested that Congress more intensely oversee the rulemaking process. Perceptions of bureaucratic irresponsibility are noted in the report of the Brownlow Committee of the 1930's, which referred to the federal agencies as the "headless 'fourth branch' of the Government" evading the control of Congress and the President.[18]

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[13] *See* OMB Circular A-19, *supra* note 12.

[14] *See id.*

[15] *See* OMB Memo on Proposed Executive Orders, *supra* note 12.

[16] 31 U.S.C. §§ 1341(a), 1342, 1349(a), 1350, 1351, 1511-1519 (1982). OMB's power to apportion and reapportion pursuant to this Act was cited by the Office, for example, when it forced the Small Business Administration (SBA) to stop guaranteeing certain loans for the purchase or lease of pollution control equipment. *See* Testimony of the Honorable John D. Dingell Before the Subcommittee on Legislation and National Security, Committee on Government Operations, U.S. House of Representatives 2 (April 27, 1983) (copy on file with author).

The American Law Division of the Congressional Research Service (CRS) concluded that this OMB action "raises substantial questions of legal propriety. . . . There appears to be no firm legal basis for OMB's authority to order the termination of the program." M. Rosenberg, American Law Div., CRS, Subject: Authority of OMB to Suspend SBA's Pollution Control Equipment Loan Guarantee Program for Tax-Exempt Issuances 57-58 (April 22, 1983) (memorandum to Hon. Carl Levin).

[17] In recognition of OMB's broad powers, and in response to controversy over the Nixon administration OMB impoundment of certain funds, Congress codified a requirement that the OMB Director and Deputy Director be appointed with the advice and consent of the Senate. *See* Act of March 2, 1974, Pub. L. No. 93-250, 88 Stat. 11 (1974); H.R. Rep. No. 697, *supra* note 3.

[18] The President's Comm. on Admin. Mgmt., Report of the Committee with Studies of Administrative Management in the Federal Government 40 (1937) (submitted to 74th Cong., 2d Sess.).

An Attorney General report drafted late in the New Deal also urged the President to exert more control, and argued for the creation of a central office of Federal Administrative Procedure. *See* Att'y Gen. Comm. on Admin. Procedure, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

As early as 1952, it was proposed that the President be empowered to direct any agency to

o broaden the scope of regulatory review
agency rules. These reviews were primar-
rulemaking agencies generally were free
f review authorities.[26] The continuing in-
idential oversight spurred increasing de-
nity, including the seminal Cutler and
and influential follow-up work by Profes-
Commission on Law and the Economy.[27]
peatedly has declined to enact legislation
centralized presidential oversight.[28]

e Order 12,291

after taking office, President Reagan
2,291 on Federal Regulation.[29] The new
in OMB veteran, "a completely different
ssors;[30] without question, it vests much

Order requires all executive[31] agencies to

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established a "Regulatory Calendar"—a compilation of
Regulatory Analysis and Review Group (RARG). *Id.*
note 22, picked a few major rules each year to analyze
lic record. *See* Eads, *supra* note 22, at 19-26; DeMuth,
I: The White House Review Programs, Reg., Jan.-Feb.

proved Quality, Adequate Resources, and Consistent
lysis is to Help Control Costs of Regulations 45 (1982)
12,291].
2.

Economy, *supra* note 2.
227-29; *see also infra* notes 100-02 and accompanying

er OMB, OIRA Deputy Adm'r, in Washington, D.C.

ecutive agencies, *see* E.O. 12,291, *supra* note 1, at §
ly voluntarily with its provisions. Vice President Bush,
Presidential Task Force on Regulatory Relief, formally
ncies to comply voluntarily with the Order. *See* Letter
independent agencies (March 25, 1981), *reprinted in*
of the Oversight and Investigations Subcomm. of the
r, 97th Cong., 1st Sess. 177-78 (1981) [hearings herein-
OMB]. Although several independent agencies have
o the fullest extent possible, *see Hearings on Role of*
Aeronautics Board has committed itself to pre-publi-

send all proposed and final regulations to OMB for pre-publication review. An agency may not issue the rule or proposal until it responds to OMB's comments. Any "major" rule—a rule with an impact of over $100 million, a rule which is expected to cause certain other adverse economic impacts, or any rule designated "major" at OMB's discretion—must be accompanied by a detailed "Regulatory Impact Analysis" (RIA) assessing its costs and benefits. OMB also reviews the adequacy of the RIA. Although the Office is given sixty days to review a proposed major rule, thirty days to review a final major rule, and ten days to review a non-major rule, it may extend its review without time limit simply by so notifying the agency.[32]

Under the Reagan Order OMB is directed to review each regulatory action to promote regulations that maximize "aggregate net benefits to society."[33] The Office is instructed, however, to exercise its powers only "to the extent permitted by law."[34]

OMB's Office of Information and Regulatory Affairs (OIRA) is the focal point for review of all contemplated and many existing agency rules.[35] The August 1983 disbanding of the Presidential

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[32] *See* E.O. 12,291, *supra* note 1, § 1(d).

[33] *Id.* § 2(e). The Order requires OMB to review agency rules to ensure that:
  a) They are based "on adequate information";
  b) Their "potential benefits to society. . .outweigh the potential costs";
  c) They involve "the least net cost to society";
  d) They "maximize net benefits to society"; and,
  e) They consider the condition of the economy and of regulated industries, and the future effects of the rules.
Id. § 2.

In addition to these oversight duties, OMB is directed (previously subject to review by the now-defunct Presidential Task Force on Regulatory Relief) to:
  a) Prescribe procedures for agency drafting and mailing of RIA's;
  b) Waive review or other requirements of the Order for any rules which it believes should be expeditiously promulgated;
  c) Designate existing rules for review and set up review schedules for them;
  d) Coordinate publication of an agenda of all contemplated executive agency rules;
  e) Recommend changes to agencies' legislation, in coordination with the agencies; and,
  f) Identify conflicting or overlapping rules of different agencies.
Id. §§ 3 to 9.

[34] *See, e.g., id.* §§ 2, 3.

[35] OIRA, created by the Paperwork Reduction Act to implement that statute's paperwork review requirements, exercises primary E.O. 12,291 review power. It formerly was headed by Dr. James Miller III (currently FTC Chairman), who was replaced by Christopher DeMuth. DeMuth left OIRA in mid-1984. With a staff of about 80, OIRA is divided into two key offices. The Information and Regulatory Management Division (formerly headed by Jim Tozzi, now by Robert Bedell), employs in its Regulatory Policy Branch the "Desk Officers." Desk Officers are the front-line staff-level analysts of agency rules. At this writing EPA is

Task Force on Regulatory Relief,[36] which had oversight authority over OMB, now leaves an agency no formal recourse from an OMB review, except, perhaps, a request for presidential intervention. Such intervention is not explicitly provided for in E.O. 12,291.

II. LEGAL & POLICY ISSUES RAISED BY OMB REVIEW OF EPA RULES

OMB review of EPA rules raises constitutional, statutory and policy concerns. Despite the clear language of E.O. 12,291 authorizing review only to the extent permitted by law,[37] OMB may encroach upon the discretion and judgment statutorily delegated to EPA, and may effectively introduce non-statutory criteria into agency decisionmaking. OMB review also encourages industry-OMB and OMB-EPA ex parte contacts which at best undermine decisionmaking integrity and at worst contravene the Administrative Procedure Act.

A. OMB Review: The Proper Scope

1. Presidential Review of Rulemaking

a. Arguments for Presidential Review

During the past decade, a chorus of academicians, private lawyers, and government policymakers has sung the praises of centralized presidential review of agency rulemaking.[38] In *Sierra Club v. Costle*,[39] Judge Wald of the D.C. Circuit advanced a common-sense justification for presidential review:

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assigned three Desk Officers. Interviews with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983). The Regulatory and Statistical Analysis Division is the reincarnated Council on Wage and Price Stability and is staffed by "Regulatory Analysts," who generally have economics or public administration backgrounds. *Id.*

Finally, OMB's budget branch, separate from OIRA, employs "Budget Examiners," who are assigned to individual agencies. The Budget Examiners also review EPA rules, and in many cases may have decisive input. *Id.*

Although the Budget Examiners and Desk Officers "are just G.S. twelves or fourteens, if both of them get on your [agency's] case, you're in a lot of trouble." Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983). In many cases "Assistant Secretaries have come crying" to these staff-level OMB people, "pleading" for mercy. *Id.*

[36] *See* Wash. Post, Aug. 12, 1983, at A-15, cols. 4-5 (noting demise of Task Force).

[37] *See* E.O. 12,291, *supra* note 1.

[38] *See, e.g.*, ABA Comm'n on Law and the Economy, *supra* note 2; Bruff, *supra* note 2; Cutler & Johnson, *supra* note 2.

[39] 657 F.2d 298 (D.C. Cir. 1981).

> The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, environmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive. Single mission agencies do not always have the answers to complex regulatory problems. An overworked administrator exposed on a 24-hour basis to a dedicated but zealous staff needs to know the arguments and ideas of policymakers in other agencies as well as in the White House.[40]

Presumably, the President's reviewers are not locked into the "old way of thinking," nor are they captured by the "iron triangle" comprising agency policymakers, congressional overseers, and the agency's constituency.[41] Perhaps implicit in Judge Wald's concern for a broad decisionmaking perspective is the assumption that the President's designated reviewers of rules have at their disposal tools for objective policy analysis.[42]

In addition, advocates of presidential review argue that inappropriate past regulation has revealed a need to make regulators more accountable to the public.[43] It is asserted that presidential supervision of rulemaking returns decisionmaking to the control of the electorate, and reins a politically insulated bureaucracy gone astray.[44]

b. *Response to Arguments for Presidential Review*

While arguments for presidential review may seem persuasive, troublesome questions arise on closer analysis. The two principal purposes of review, justifying rules via objective economic analysis and ensuring their political acceptability, are in fundamental conflict. OMB oversight in practice lays bare this schizophrenia. Cost-benefit analysis falls victim to political intervention; regulations considered politically unfavorable are relaxed without regard to costs and benefits.[45] OMB review politicizes technical issues,[46] if only because of the Office's admitted anti-regulatory bias.[47] Increased friction between the agencies can result, without improving the quality of agency decisions.[48]

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[40] *Id.* at 406.

[41] *See* Pedersen, *How Well Can OMB Regulate the Regulators?*, Envtl. Forum, Aug. 1984, at 7, 10.

[42] *Cf.*, DeMuth, *The Reagan Record: A Strategy for Regulatory Reform*, Reg., Mar.-Apr. 1984, at 25, 26-29.

[43] *See, e.g.*, Cutler & Johnson, *supra* note 2.

[44] *See, e.g.*, *id.*; ABA Comm'n on Law and the Economy, *supra* note 2.

Further, while OMB oversight is intended to increase the objectivity and rationality of decisionmaking, the opposite effect may result due to the Office's lack of staff and inadequate technical expertise. A few relatively low-level OMB "Desk Officers," some with no background in scientific or environmental matters, are charged with reviewing hundreds of highly complex technical rulemakings developed by the large, highly trained EPA staff. Not surprisingly, EPA officials frequently complain of the lack of expertise of OMB staff, and of the large amount of time they must spend to "educate" OMB staff about a rulemaking.[49]

Finally, the Office's propensity for secrecy, as attested to by its alarm at the notion of being required to divulge fully its review process,[50] tends to undercut the value of OMB review. OMB is not increasing the accountability of government; rather, it jealously keeps its influence a secret from the electorate. If OMB review is indeed aimed at rationalizing rulemaking, OMB should not object to complete disclosure.

It would be untenable to suggest that the EPA Administrator or any other executive official should be wholly isolated from OMB, the White House or Congress. Direct and secret *supervision* of EPA decisions by OMB, however, is not necessary to ensure that the Administrator gains the perspective to which Judge Wald referred in *Sierra Club*.

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[45] *See infra* notes 275-80 and accompanying text; *see also* particulate matter NAAQS case study, *infra* notes 371-80 and accompanying text.

[46] *See, e.g.*, high-level radioactive waste rule case study, *infra* notes 326-49 and accompanying text; *EPA: Investigation of Superfund and Agency Abuses (Part 3): Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 5-8, 79-83 (1983) (testimony of John Daniel) [hereinafter cited as *Daniel Testimony;* hearings hereinafter cited as *Hearings on Superfund*].

[47] *See infra* notes 201-06 and accompanying text.

[48] *See* Section III.D. Case Studies, *infra* text accompanying notes 326-80.

[49] Interview with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.; *Daniel Testimony*, *supra* note 46, at 82 (in EPA's experience, OMB employed economists, not environmental or health experts).

[50] *See infra* notes 298-300 and accompanying text.

2. *The President's "Inherent" Power to Oversee Executive Agency Rulemaking*

Some argue that the President enjoys an "inherent" authority to supervise agency rulemaking:[81] inherent in the President's constitutional authority as Chief Executive,[82] and implicit in the "take care" clause,[83] his judicially created removal power,[84] and his authority to demand written opinions from his cabinet officials.[85] The advocates of presidential review, like Judge Wald in *Sierra Club*,[86] rely heavily on Chief Justice Taft's dictum in *Myers v. United States*[87] asserting that the President generally may "supervise and guide" subordinate executive officers' construction of statutes "to secure th[e] unitary and uniform execution of the laws." Professor Strauss has gone so far as to suggest that even presidential supervision of independent commissions' rulemaking generally is proper.[88]

There is some merit in the proposition that, at least as to executive agencies, the President should have the authority to guide his subordinates' execution of the laws. As Chief Executive, he must "take care" that the laws are faithfully executed. There is little evidence, however, that the framers, having just escaped from the oppressive authority of King George, intended to vest implicitly in the President the absolute authority to control activities of the executive branch. As the *Myers* dissent noted, it seems implausible that the framers, politically astute, would have debated for hours whether the Constitution should expressly give the President the right to require opinions in writing from executive officers, if they had "already vested the illimitable executive power" in the President.[59] Even as strong a proponent of centralized executive authority as Alexander Hamilton took pains to point out the President's limited authority over government.[60] Hamilton warned that the new Constitution should prevent subordinate executive officers from "possessing the necessary insignificance and pliancy to render them the obsequious instruments of [the President's] pleasure."[61] Furthermore, nineteenth century Supreme Court authority,[62] early opinions of the Attorneys General,[63] and other authority[64] speak against an inherent presidential authority to control all executive agency activity.

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[81] *See, e.g.*, L. Simms, Dept. of Justice, Office of Legal Counsel, Re: Proposed Executive Order on Regulation 2 (Feb. 12, 1981) (memorandum to David Stockman, Director, OMB), *reprinted in Hearings on Role of OMB*, *supra* note 31, at 152, 153; Cutler, *The Case for Presidential Intervention in Regulatory Rulemaking By the Executive Branch*, 56 Tul. L. Rev. 830 (1982) (Supreme Court cases and Constitution allow presidential supervision); Shane, *supra* note 2 (former OMB official arguing that the Executive Order is constitutional).

[82] U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President. . . .").

[83] *Id.* § 3 (The President "shall take Care that the Laws be faithfully executed.").

[84] Although the President's removal power is not found in the text of the Constitution, implicit authority has been found. *See Removal Cases*, *infra* note 92.

[85] U.S. Const. art II, § 2 ("The President. . .may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices. . . ."). For a discussion of this "trifling" power and other sources of presidential authority, see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-42 & n.9 (1952) (Jackson, J., concurring).

[86] 657 F.2d 298, 406 & n.524 (D.C. Cir. 1981).

[87] 272 U.S. 52, 135 (1926).

[88] *See* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 662-66 (1984).

Nonetheless, during the twentieth century claims to inherent presidential authority have proliferated.[65] Some commentators have welcomed such claims as the necessary offspring of the increasing complexities of modern-day government.[66] Others, however, are not so sanguine. Professor Tribe, for example, has urged that "claims to inherent executive power should henceforth be regarded with the great suspicion they deserve in an era that has already witnessed too much presidential aggrandizement."[67]

The debate will continue. One can accept the notion that the

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[59] *Myers*, 272 U.S. at 207 (McReynolds, J., dissenting).

[60] *See* The Federalist Nos. 67, at 436-40, 69, at 444-50 (A. Hamilton) (B. Wright ed. 1961) (citing narrow limits within which President may exercise his authority, as opposed to broad powers enjoyed by Congress or a monarch).

[61] *Id.* No. 76, at 483 (A. Hamilton).

[62] *See, e.g.*, Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (denying the President the power to direct the Postmaster General's performance of his ministerial duty).

[63] Attorney General William Wirt, for example, advised President Monroe:

> If the laws. . .require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only not be taking care that the laws were faithfully executed, but he would be violating them himself.

1 Op. Att'y Gen. 624, 625 (1823); *see also* 18 Op. Att'y Gen. 33 (1884); 4 Op. Att'y Gen. 516 (1846). For a detailed review of these and other early opinions, see Rosenberg, *supra* note 2, at 204 & n.52-55.

[64] Early commentators, for example, noted the original intent that the President be primarily a political chief, not the administrative head of government. *See, e.g.*, 2 W. Willoughby, The Constitutional Law of the United States 1156 (1910).

[65] These claims have been inconsistently received by the Supreme Court. For discussion of the Court's treatment of the "inherent" executive powers, see Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863 (1983).

[66] *E.g.*, Cutler, *supra* note 51; Shane, *supra* note 2.

[67] L. Tribe, American Constitutional Law § 4-7 (1978).

President, in carrying out his duty to see that the laws are faithfully executed, may suggest that a subordinate executive official take certain regulatory action, if the action is fully supported by the administrative record and accords with a broad delegation of authority in the applicable statute (unless, of course, Congress has placed that decision beyond the President's control).[68] However, it is more difficult to accept the notion that an executive order which expressly precludes OMB from displacing discretion vested in other agencies may be the source of OMB's authority to be a "superagency" supervising rulemaking by EPA and other agencies. When a statutory provision clearly vests a decision in the expert judgment of the EPA Administrator, ultimately only the Administrator can "faithfully execute" the law.

3. Separation of Powers: Limits on OMB Review of Decisions Clearly Delegated by Congress to the EPA Administrator

Executive Order 12,291 expressly prohibits OMB from displacing decisionmaking authority delegated to agencies by law,[69] and provides that substantive review by OMB may take place only "to the extent permitted by law."[70] Furthermore, "independent" agencies are exempted from mandatory OMB review.[71] However, the Order's provisions, which in theory preclude conflicts between statutes and OMB review, are sometimes ignored or creatively interpreted in practice.[72]

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[68] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb") (Jackson, J., concurring).

[69] E.O. 12,291, *supra* note 1, § 3(f)(3).

[70] *See, e.g., id.* §§ 2, 6(a), 7(e), 7(g).

[71] *Id.* § 1(d) expressly exempts from the Order's mandatory provisions those independent agencies specified in the Paperwork Reduction Act, 44 U.S.C. § 3502(10) (1982) (definition of "independent regulatory agency" under the Act), and expressly applies those provisions to agencies listed in *id.* § 3502(1) (definition of "agency").

Commentators disagree over the extent to which the President properly may oversee the activities of independent agencies. *Compare* Strauss, *supra* note 58, at 592-96 (President may require independent agencies to engage in economic analyses as required by E.O. 12,291, and may oversee independent agency execution of the law) *with* Bruff, *supra* note 2, at 483 ("If the dicta of the removal cases are taken at face value, the net result of the Court's rigid approach is unrestricted Presidential domination over executive officers, and complete protection from his influence for independent officers.").

[72] *See infra* text accompanying notes 254-80.

a. The EPA Administrator: Repository of Congressionally Delegated Authority

In the late 1960s Congress began to enact an extensive body of legislation to address complex environmental, health and social problems. Some grants of rulemaking authority to agencies are broad and general.[73] Other legislation is detailed, setting forth specific decisionmaking criteria to guide the administrator's discretion.[74] In the case of EPA, Congress frequently has expressed its intent that the Administrator apply his or her own expertise, and that of the agency, in regulating technically sophisticated endeavors.[75]

Since EPA's inception in 1970,[76] Congress has delegated to it a cornucopia of regulatory authority,[77] while referring to the agency as a quasi-"independent" body, responsible to Congress as well as to the executive and the public.[78] Congress views EPA as a repository of congressionally delegated power.[79] Legislation vests decisionmaking authority in EPA with a view to the Agency's mission orientation,[80] its technical expertise, and, some have argued, its supposed insulation from the vagaries of partisan politics.[81]

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[73] *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982) (granting Secretary of Labor broad regulatory and investigatory authority over the workplace); Federal Water Pollution Control Act § 501(a), 33 U.S.C. § 1361(a) (1982) ("The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this [Act].").

[74] *See, e.g.*, Clean Air Act §§ 108(a), 109, 42 U.S.C. §§ 7408(a), 7409 (1982) (only certain health factors may be considered in setting ambient standards); Resource Conservation and Recovery Act § 3001, 42 U.S.C. § 6921 (1982) (citing criteria for identifying and listing a hazardous waste, which include its "toxicity, persistence, and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness, and other hazardous characteristics").

[75] *See, e.g.*, H.R. Rep. No. 1185, 93d Cong., 2d Sess. 9-10 (1974), *reprinted in* Congressional Research Serv., Env't and Natural Resources Policy Div., A Legislative History of the Safe Drinking Water Act 542-43 (Comm. Print 1982) (prepared for Senate Comm. on Env't and Pub. Works, 97th Cong., 2d Sess.) (emphasizing that primary drinking water standards are to be based on "the judgment of the Administrator" that a contaminant may have an adverse health effect "based upon epidemiological, toxicological, physiological, biochemical, or statistical research or studies or extrapolations therefrom." For a provocative treatment of the implications for government of the trend toward increasingly technical and abstruse administrative rulemaking, see Yellin, *Science, Technology, and Administrative Government: Institutional Designs for Environmental Decisionmaking*, 92 Yale L.J. 1300 (1983).

Such clear delegations of authority to the EPA Administrator's judgment contrast starkly with legislative delegations to the President, which may be redelegated to EPA or other agencies. *See, e.g.*, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9604-9606 (1982) (authorizing the President to take certain actions to respond to hazardous substance releases).

[76] Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 Comp.), *reprinted in* 5 U.S.C.A. app. at 70 (Supp. 1984) (creating the Environmental Protection Agency).

[77] *E.g.*, Clean Air Act, 42 U.S.C. § 7401-7642 (1982); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982); Noise Control Act, 42 U.S.C. §§ 4901-4918 (1982); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1982); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982); Safe Drinking Water Act, 42 U.S.C. §§ 300f-300j-10 (1982).

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[78] Proposing the creation of EPA, President Nixon stated to Congress: "[N]ew *independent* agencies normally should not be created. In this case, however, a *strong, independent* agency is needed." Reorganization Plans Nos. 3 and 4 of 1970, Message from the President of the United States (July 9, 1970), H.R. Doc. No. 366, 91st Cong., 2d Sess. (1970) (emphasis added), *reprinted in Reorganization Plan No. 3 of 1970 (Environmental Protection Agency): Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 91st Cong., 2d Sess. 2, 5 (1970) [hearings hereinafter cited as *House Hearings on the Creation of EPA*].

Throughout hearings on the creation of EPA, legislators and administration officials alike stressed the need for the agency's independence. *See, e.g., House Hearings on the Creation of EPA, supra* at 24, 27 (statements of Russell Train, Council on Environmental Quality Chairman); *id.* at 33 (statement of Rep. Erlenborn); Senate Committee on Government Operations, Subject: Reorganization Plan No. 3 of 1970—Environmental Protection Agency (July 23, 1970) (staff memorandum no. 91-2-23), *reprinted in Reorganization Plans Nos. 3 and 4 of 1970: Hearings Before the Subcomm. on Executive Reorg. and Gov't Research of the Senate Comm. on Gov't Operations*, 91st Cong., 2d Sess. 24 (1970) [hearings hereinafter cited as *Senate Hearings on the Creation of EPA]; Senate Hearings on the Creation of EPA, supra* at 34 (Hon. Gaylord Nelson quoting Rocco Siciliano, Under Secretary of Commerce); *id.* at 39-43 (statement of Sen. Muskie); *id.* at 49 (statement of Russell Train); *id.* at 89 (statement of Dwight Ink, Ass't Director, OMB); *id.* at 93 (statement of Andrew Rouse, Executive Director, Presidents' Advisory Council on Executive Organization [the "Ash Council"]).

EPA is not, however, an independent agency wholly outside of the executive branch; the President does appoint, with Senate advice and consent, the EPA Administrator, a Deputy Administrator, and up to five Assistant Administrators. Reorg. Plan No. 3 of 1970, *supra* note 76, § 1 (b)-(d). Also, the President has dismissed at least one of his EPA appointees without congressional protest. *See* Wash. Post, Mar. 26, 1983 at A2, cols. 1-6 (noting that the President had fired Rita Lavelle, EPA Assistant Adm'r for Solid Waste & Emergency Response, and that, in all, 13 EPA political appointees had been fired, had voluntarily resigned, or had resigned under pressure in the EPA controversy over alleged mismanagement and illegal activities by top-level EPA officials).

[79] *See supra* note 78; Staff of Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess., Report on the President's Claim of Executive Privilege Over EPA Documents, Abuses in the Superfund Program, and Other Matters 12, 282-94 (Comm. Print 1984) (criticizing OMB interference with EPA rulemaking) [hereinafter cited as Oversight Subcomm. Report on Executive Privilege]; *see also* Report on Regulatory Reform, *supra* note 20, at 117 ("As evidenced by the statements of President Nixon and Mr. Train[, EPA] was to be a *strong, independent* regulatory agency") (original emphasis); *id.* at 125 (arguing that OMB's prolonged review of certain rules "constituted an attempt extra-legislatively to preempt that authority" which the Clean Air Act "clearly vests. . .in the Administrator"); *accord Hearings on Superfund, supra* note 46, at 2 (Rep. Dingell, Comm. Chm'n, expressing view that E.O. 12,291 has resulted in OMB "powers to displace the discretionary authority Congress has given to agency decisionmakers").

[80] For clear evidence that EPA was created by the President, with the approval of Congress, to carry out a well-defined mission to improve environmental quality, see *supra* note 78.

b. Limits on OMB Review Authority

If OMB review of regulatory decisions clearly delegated by Congress to the EPA Administrator has become a supervisory or decision-controlling procedure, rather than a mere interagency commenting procedure,[82] from what source does OMB's control authority derive? No statute may be said even implicitly to vest such authority in the Office.[83] The Executive Order itself expressly denies OMB the authority to displace decisions vested by law in another agency.[84] Even assuming the Executive Order to be an implicit presidential grant of supervisory authority to OMB, may a unilateral presidential action in the domestic arena, unsupported by any legislation, properly vest in OMB the authority to assume decisionmaking discretion Congress clearly has vested in the EPA Administrator?

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[81] Former EPA Administrator Ruckelshaus recently noted, for example, "[T]he major lesson of the unpleasant events of last year [the 1983 EPA scandal] was that the American people will not tolerate the involvement of partisan politics in the operation of environmental programs." Envtl. Forum, Aug. 1984, at 5 (quoting William Ruckelshaus, EPA Adm'r).

[82] The power of OMB effectively to supervise EPA rulemaking is discussed *infra* notes 201-53 and accompanying text.

[83] Judge Harold Greene has held, it seems correctly, that neither OMB's organic legislation nor its Reorganization Plan authorizes OMB usurpation of discretion granted by statute to another agency. American Fed'n of Gov't Employees v. Freeman, 498 F. Supp. 651, 658 (D.D.C. 1980). *AFGE*, decided before E.O. 12,291 was signed, held that OMB has been given no authority to direct General Services Administration (GSA) discretion. It noted, however, that because *no* executive order "issued pursuant to legitimate Presidential authority" purported to give OMB such power, the Court need not decide whether the President, as head of the Executive Branch, would be empowered to direct GSA with respect to a matter entrusted to its discretion by statute." *Id.* at 658 & n.16.

OMB asserts that E.O. 12,291, the Budget and Accounting Act, 31 U.S.C. § 1111 (1982), and the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 (1982), give it legal authority to request changes in EPA regulations. *See* Questions from the Subcommittee on Administrative Law and Governmental Relations for the Office of Management and Budget, August 2, 1983 (attachment to letter from Christopher DeMuth, OMB, OIRA Adm'r to Hon. Sam B. Hall, Subcomm. Chm'n, Sept. 2, 1983) (Question 14) [hereinafter cited as OMB Response to House Questionnaire], *reprinted in Regulatory Reform Act: Hearings Before the Subcomm. on Admin. Law and Govtl. Relations of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. 971, 980 (1983) [hearings hereinafter cited as *Hearings*].

Neither of the Acts cited by OMB even impliedly authorizes the Office to review rules. The Budget and Accounting Act includes no provision even remotely suggesting that OMB (or its predecessor, the Bureau of the Budget) should review regulations. The Paperwork Reduction Act states clearly that it is not to be construed "as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, . . .with respect to the substantive policies and programs" of agencies. 44 U.S.C. § 3518(e). Indeed, OMB admits, "[L]egislative history is clear that Congress did not intend the Paperwork Reduction Act to be a 'regulatory reform' bill." OMB, Controlling Paperwork Burdens on the Public, 48 Fed. Reg. 13,666, 13,668 (1983) [hereinafter cited as OMB Paperwork Rules]. The Senate Committee Report notes that it did "*not intend that 'regulatory reform' issues* which go beyond the scope of information management and burden *be assigned to the Office*." S. Rep. No. 930, 96th Cong., 2d. Sess. 8-9 (1980) (emphasis added).

Finally, when EPA and OMB were created by their respective Reorganization Plans in 1970, there were indications that OMB was not to have supervisory authority over EPA. *See* Reorganization Plan No. 2 of 1970, Message from the President of the United States (Mar. 12, 1970), H.R. Doc. No. 275, 91st Cong., 2d Sess., *reprinted in Reorganization Plan No. 2*

The Supreme Court has said little regarding the limits of presidential authority to take domestic[85] action without Congress' blessing. The primary source of guidance in this field is *Youngstown Sheet & Tube Co. v. Sawyer*,[86] the *Steel Seizure Case*. Justice Jackson's oft-cited concurrence[87] proposes that where the President acts pursuant to an express or implied grant of power, his constitutional authority is at its maximum.[88] On the other hand, as Jackson explained, if the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[, and] Courts can sustain exclusive Presidential control . . . only by disabling Congress from acting on the subject."[89] Where there exists no relevant statute tending to affirm or deny the President's asserted authority, there is a "zone of twilight," suggested Jackson, in which the President and Congress may share authority.[90]

More recently, the Court's somewhat inflexible approach to the separation of powers principle, as shown in *Immigration and Naturalization Serv. v. Chadha*,[91] seems to emphasize that any action

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of 1970: Hearings Before a Subcomm. of the House Comm. on Gov't Operations, 91st Cong., 2d Sess. 2, 3-5 (1970) (OMB to be concerned with *how* government operates, whereas Domestic Council was to have more substantive role); *Senate Hearings on the Creation of EPA*, *supra* note 78, at 87 (statement of OMB Ass't Director Ink that EPA would be setting standards and OMB would merely be concerned "with the effective operation of governmental machinery").

[84] E.O. 12,291, *supra* note 1, § 2(f)(3).

[85] The President's powers respecting foreign relations may be more expansive than they are in the domestic context. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981).

[86] 343 U.S. 579 (1952). In this decision, President Truman's seizure of several steel mills, justified on the basis of a national defense emergency need for steel to fight the Korean War, was held an unconstitutional usurpation of Congress' legislative powers.

[87] *Id.* at 634 (Jackson, J., concurring). Justice Black's plurality opinion has been eclipsed in judicial and academic writings by Justice Jackson's concurrence. *See* Dames & Moore v. Regan, 453 U.S. 654 (1981); Bruff, *supra* note 2, at 471-72.

[88] 343 U.S. at 635-37.

[89] *Id.* at 637-38.

[90] *Id.* at 637. The Court's continued reliance on the Jackson analysis was confirmed in Dames & Moore v. Regan, 453 U.S. 654 (1981).

[91] 103 S.Ct. 2764. The Chadha Court held a one-house legislative veto provision in §

with the purpose and effect of legislation must either be enacted in conformity with constitutional procedures, or be the direct product of an express delegation of legislative authority to an agency. No single branch is empowered to take action of a legislative nature.

These principles cast doubt on the permissibility of an executive order that implicitly grants to OMB the authority to control decisions expressly delegated to the discretion or judgment of another agency. Such OMB control would constitute a substantive change in the statutory delegation. Absent an express or implied legislative statement that OMB control of the decision was contemplated, the Office's encroachment would contravene Congress' directive.

Reinforcing the view that clear delegation of authority to a lesser executive official must be honored is Chief Justice (and former President) Taft's dictum in the celebrated case of *Myers v. United States.*[93] A vocal supporter of presidential power, Taft believed

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244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), to be unconstitutional. The Court reasoned that the action there at issue was "essentially legislative in purpose and effect," 103 S.Ct. at 2784, and therefore "could have been achieved, if at all, only by legislation" passed by both Houses of Congress and either signed by the President, or the President's veto overridden, *id.* at 2785. Justice White reminded the Court in dissent that the entire administrative state is dependent on rules essentially legislative, though not adopted pursuant to the formalities of the Constitution. *Id.* at 2801-04 (White, J., dissenting). The Court responded: "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1,7." *Id.* at 2785 n.16. The Court also reiterated: "Clearly, . . . '[i]n the framework of our Constitution the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id.* (quoting the *Steel Seizure Case*, 343 U.S. 579, 587 (1952)). Thus, it seems likely that OMB could ignore a clear and specific legislative directive, such as a delegation of authority to the expert judgment of a named administrator, only at the risk of being held in contravention of statutory authority.

[93] 272 U.S. 52 (1926). The first major twentieth century case to address the power of the President vis-a-vis Congress to dismiss federal employees, *Myers* held that Congress could not constitutionally restrict the President's power to fire a postmaster, an executive officer appointed by the President with the advice and consent of the Senate. Chief Justice Taft, writing for the majority, found a broad executive power to remove executive officers, although, except in cases of an impeachable offense, the Constitution is silent on the subject. *See* U.S. Const. art. II. Taft found this broad power implicit in, for one, the "take care" clause. 272 U.S. at 129-34. Taft readily conceded: "To Congress, under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction. . . ." *Id.* at 129.

In Humphrey's Executor v. United States, 295 U.S. 602 (1935), the second of the so-called Removal Cases, the President was held to lack the power to remove an FTC commissioner before his term expired, except for one of the congressionally established causes. The Court reasoned that the FTC clearly was intended by Congress to be an "independent" agency, and "one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will"; furthermore, the FTC that the President may generally "supervise and guide" his subordinates' construction of statutes in order "to secure th[e] unitary and uniform execution of the laws."[93] The Chief Justice opined, however, in a frequently overlooked[94] portion of the *Myers* opinion, that those decisions "peculiarly and specifically committed to the discretion" of a lesser executive officer by statute, or decisions "quasi-judicial" in character, may be beyond even the President's proper influence.[95]

Taft's dictum that a superior must honor a clear delegation of authority to his subordinate finds support in *United States ex rel. Accardi v. Shaughnessy*.[96] In *Accardi* the Supreme Court held that the Attorney General could not direct a decision which he had delegated by regulation to the discretion of a subordinate panel. The Court noted that "if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience."[97] Similarly, the 1838 Supreme Court decision in *Kendall v. United States*[98] and early opinions of United States

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"duties are neither political nor executive, but predominately quasi-judicial and quasi-legislative." *Id.* at 624. The "fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence" of the others precluded the President from firing the commissioner against the congressional mandate. *Id.* at 629.

The *Humphrey's* opinion could be read, in conjunction with *Myers*, to mean that the functional character of an officer's job might determine the power of the President to dismiss him.

In Weiner v. United States, 357 U.S. 349 (1958), the Court reiterated the bright-line functional test of "purely executive" versus quasi-judicial or quasi-legislative. The Court found the President lacked the power to remove an official, this time a member of the War Claims Commission fired for political reasons by President Eisenhower. Questions before the Commission were to be adjudicated "according to law" (that is, on the merits of each claim, supported by evidence and governing legal considerations) by a body "entirely free from the control or coercive influence, direct or indirect," of the President or Congress. *Id.* at 355-56. To protect the Commission from such coercive influence, the Court held that the commissioner could not be removed. *Id.* at 356.

[93] 272 U.S. at 135.

[94] For example, the court in Sierra Club v. Costle, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981), fails to cite or discuss this important passage of the *Myers* opinion, although it quotes from the sentence preceding it, and rests much of its analysis of presidential authority over rulemaking on the *Myers* dictum.

[95] 272 U.S. at 135.

[96] 347 U.S. 260 (1954). While the *Accardi* Court held that the Attorney General could not properly control the subordinate panel's decision, the Court did not find that he was foreclosed from continuing to enjoy his *undelegated* authority formally to overrule the panel pursuant to statutory and regulatory procedures.

[97] *Id.* at 267.

[98] 37 U.S. (12 Pet.) 524 (1838). The Court denied the President the power to direct the

Attorneys General[99] tend to affirm that a decision specifically vested by statute in the discretion or judgment of a lesser executive official is beyond the proper control of his superiors, including the President.

Determining the permissibility of OMB influence on agency rulemaking pursuant to E.O. 12,291, therefore, requires a search for any implied or explicit expression of congressional will which grants or denies the President the authority to oversee or control the agency rulemaking under examination. Despite the repeated efforts of past and present Presidents, Congress has refused to codify any "Regulatory Reform" statute that would ratify broad OMB or presidential oversight of rulemaking.[100] Some commentators have inferred from Congress' repeated rejection of these bills, and from the lack of any other statutory support for OMB or presidential review of rulemaking,[101] a congressional will to reject such review.[102] At the same time, clear congressional delegation of regulatory decisionmaking to the EPA Administrator's expert judgment, accompanied by Congress' expectation that the EPA Administrator will remain "independent" and responsible to Congress and the public as well as to the President,[103] may reasonably be viewed as

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Postmaster General's performance of his ministerial duty. Rosenberg, *supra* note 2, at 205, argues that *Kendall* "reflect[s] the nineteenth-century notion that the President may not direct the manner in which executive officers carry out their discretionary functions."

[99] *See, e.g.*, 1 Op. Att'y Gen. 625 (1823) ("[T]he Constitution assigns *to Congress* the power of particular subordinate officers. . . . [The President] has the power of removal, but not the power of correcting, by his own official act, the errors of judgment of incompetent or unfaithful subordinates.") (emphasis added); 18 Op. Att'y Gen. 33 (1884) (advising the President, "It has been repeatedly held that the observance of your constitutional duty of taking care that laws be faithfully executed does not of itself warrant your taking part in the discharge of duties devolved by law upon an executive officer"). *But see* 7 Op. Att'y Gen. 453 (1855).

[100] The most recent victims were H.R. 2327, 98th Cong., 1st Sess. (1983) and S. 1080, 98th Cong., 1st Sess. (1983), both of which died in the 98th Congress. Extensive hearings were held on the House Bill, in which agency staff and outside observers strongly criticized current OMB review practices. *See Hearings, supra* note 83.

Congress' repeated rejections of attempts to codify OMB review are reviewed in Rosenberg, *supra* note 2, at 219-20, 227-34. *See also Probably Doomed for Year: Rules Committee Fails to Act; Regulatory Reform Stalled*, 1982 Cong. Q. 3029 (Dec. 11, 1982).

[101] *See supra* note 83.

[102] *See, e.g.*, Rosenberg, *supra* note 2, at 227-34.

[103] *See supra* note 78.

The Department of Justice memorandum clearing E.O. 12,291 argues that "supervision is more readily justified when it does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official. A wholesale displacement might be held inconsistent with the statute vesting authority in the relevant official." Simms, *supra* note 51, at 4.

an implied expression of congressional will that those decisions not be overseen by OMB. Thus, to avoid a constitutional question, a court should read E.O. 12,291 as withholding OMB authority over decisions delegated by statute to the judgment of the Administrator.

c. *Introduction of Non-Statutory Criteria into Agency Rulemaking*

Executive Order 12,291 directs OMB to ensure "to the extent permitted by law"[104] that the costs of a regulation do not exceed its benefits, and to attempt to assure that net societal benefits are maximized in agency rulemaking.[105] As noted above, many statutory provisions delegating rulemaking authority to EPA list specific factors (e.g., protection of public health) on which the regulation is to be based. Cost and cost-effectiveness are at times noticeably absent from the list.[106] May OMB properly require EPA to consider economics in its rulemaking when this is not made relevant by the statute authorizing the rule?

Substantial case authority holds that where a statute sets out certain factors to be considered by an agency in a rulemaking, only those factors may be considered.[107] In *Lead Industries Ass'n v. EPA*,[108] for example, the D.C. Circuit rejected an argument that EPA consider the economic or technical feasibility of achieving certain air pollution standards, noting:

This memorandum, however, seems to misperceive the case authorities' thrust. The correct focus is not on whether the displacement of authority is wholesale or only partial; rather, it is on whether the relevant statute specifically and clearly places that decision in the judgment or discretion of the subordinate official. If it does, then arguably no OMB or presidential supervision—wholesale or limited—would be proper.

[104] E.O. 12,291, *supra* note 1, § 2.

[105] *Id.*

[106] *See, e.g.*, 42 U.S.C. § 7409(b)(1) (1982) (EPA Administrator shall promulgate primary National Ambient Air Quality Standards "based on such [published health-based] criteria and allowing an adequate margin of safety, [as] are requisite to protect the public health"); *cf.* American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490, 510-11 (1981) ("When Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.").

[107] There is, however, case authority leaning the other way. *See, e.g.*, American Fed'n of Gov't Employees, AFL-CIO v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981) ("We cannot agree that an exercise of [statutory] authority becomes illegitimate if, in design and operation, the President's prescription, in addition to promoting economy and efficiency [as required by the applicable statute], serves other not impermissible ends as well."). This case involved an open-ended delegation of authority to the agency, rather than a set of specific factors to be considered in rulemaking.

[108] 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

> When Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of statutory authority by taking other factors into account. . . . A policy choice such as this *is one which only Congress, not the courts and not EPA*, can make.[109]

Presumably, if neither the courts nor EPA may alter Congress' policy choice, neither may OMB.

The same court reached a similar conclusion in *National Fed'n of Fed. Employees v. Brown*,[110] rejecting the President's introduction of certain non-statutorily enumerated factors:

> Under the structure of government—the separation of powers—established by the Constitution, *the President has no authority* to alter policy and principles declared by Congress even if, at the time the President acts, signals from Congress suggest it would approve the President's action. . . .We must therefore reject the sole position advanced by the Government. . . that the President remains free to define 'the public interest' in any reasonable manner and without reliance upon the explicit standards Congress set to constrain executive discretion.[111]

Other decisions confirm that it is for *Congress* to establish the factors to be considered in administrative decisionmaking.[112] If certain factors clearly are set out as the basis of decision under a statute, other considerations not made relevant by statute should not enter into the calculus.[113]

The D.C. District Court recently applied this principle to a Treasury Department rulemaking in which the agency relied on E.O. 12,291 as the basis for rescinding certain rules. Invalidating the rule rescission, the court in *Center for Science in the Public Interest v. Department of the Treasury*[114] stated: "[T]he broad thrust of Executive Order No. 12,291 provides an insufficient basis for the defendants to disregard their statutory duties. . .reflecting Congressional policy which was reaffirmed as recently as 1979."[115] Because the applicable statute included no "proviso that the regulations could be withdrawn if the costs to industry turned out to be too high,"[116] the court reasoned that the Executive Order could not add a new basis for agency action.[117]

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[109] *Id.* at 1150 (emphasis added).

[110] 645 F.2d 1017 (D.C. Cir. 1981), *cert. denied*, 102 S.Ct. 103 (1982).

[111] *Id.* at 1025 (emphasis added).

[112] *See, e.g.*, American Textile Mfrs. Inst. v. Donovan, 452 U.S. 490 (1981) (rejecting industry argument that Occupational Safety and Health Administration must engage in cost-benefit analysis when setting occupational standards for cotton dust exposure); EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980) (where industry petitioners argued that certain Clean Air Act standards should consider compliance costs, Court held that Congress had clearly intended technology-based, not cost-based, standards); Union Electric Co. v. EPA, 427 U.S. 246, 257 (1976) ("The [statutory] provision sets out eight criteria that. . .must [be] satisf[ied], and provides that if these criteria are met. . .the Administrator 'shall approve' the proposed state plan. The mandatory 'shall' makes it quite clear that the Administrator is not to be concerned with factors other than those specified.").

[113] This, of course, is one implication of the *Steel Seizure Case*: if a statute clearly sets out the criteria to be considered in a rulemaking, the President is on thin constitutional ice when he proposes to graft new considerations onto the statute. *See supra* notes 86-91 and accompanying text.

These cases illustrate that if EPA is directed by statute to consider certain specified factors in drafting a rule, it is improper for EPA, OMB, or even the President to introduce new criteria—such as the cost-benefit calculation mandated by E.O. 12,291—into the rulemaking. Of course, statutes include provisions of varying specificity as to what factors may be considered in setting a standard or other rule. Logically, the more general and broad a delegation of authority, the more likely that Congress intended to allow the decisionmaker to consider factors he deems relevant, though not specifically cited in the statute. Conversely, the more specific a delegation of authority, the less likely that Congress would countenance the introduction of non-enumerated criteria into the decision.[118]

d. *OMB Review is Proper Only if Limited*

Influence on a rulemaking ranges from mere commentary, to strong persuasion, to outright control. In light of OMB's pervasive control of executive agency budgets, personnel ceilings, and formal contacts with Congress, as well as its other powers,[119] a scrutinizing eye must be kept on the Office's "suggestions" regarding rulemaking delegated to other agencies. Comments by OMB on executive agency rules are proper, and sometimes desirable for the reasons stated in *Sierra Club*. But, while E.O. 12,291 may be entirely proper as written, it should not be used by OMB as a means to supervise decisions vested by law in the judgment of the EPA Administrator or other official.

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[114] 573 F. Supp. 1168 (D.D.C. 1983), *appeal dismissed*, ___ F.2d ___ (D.C. Cir. 1984).

[115] *Id.* at 1175.

[116] *Id.* at 1174.

[117] *Id.* at 1174-75.

[118] *See generally* Bernstein, *supra* note 2, at 827.

[119] *See supra* text accompanying notes 5-17.

B. OMB Review: The Necessity of Disclosure

1. OMB Contacts with Outside Parties During Rule Review

a. The Ex Parte Contacts Doctrine

While the Supreme Court's decision in *Vermont Yankee Nuclear Power Corp. v. NRDC*[130] may temporarily have fettered judicial creativity under the Administrative Procedure Act (APA),[131] the courts continue to sculpt the APA in an effort to accomodate the needs of modern administrative government.[132] The notion that "informal" rulemaking under the APA[133] should be accompanied by the building of a centralized administrative record has gradually gained acceptance, and continues to retain vitality despite the APA's silence on the point.[134] Courts and commentators have urged agencies to compile such a record to ensure that a complete account of the agencies' rulemaking process is available to the public, to encourage fair and intelligent debate during rulemaking, and to aid courts in reviewing the rationality of agency rulemaking under the APA. An informal rulemaking record serves to document the facts and arguments presented to the agency, and thus helps to ensure that improper, non-statutory factors are not considered in reaching the decision.[135]

Ex parte contacts—unannounced, private, and off-the-record contacts with decisionmakers by those outside the decisionmaking agency—have long been prohibited in formal rulemaking.[136] In the informal rulemaking context, however, there is no express prohibition on ex parte contacts, and the case law is confused.[127]

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[130] 435 U.S. 519 (1978). *Vermont Yankee* strongly cautioned lower courts against imposing procedural requirements not found in the APA on informal rulemaking. For discussions of the *Vermont Yankee* decision, see Stewart, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 Harv. L. Rev. 1805 (1978); Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345.

[131] 5 U.S.C. § 551-559, 701-706 (1982).

[132] *See generally* K. Davis, Administrative Law Treatise §§ 6:36-6:38 (1982 Supp.) (criticizing *Vermont Yankee* and noting continued judicial creativity).

[133] "Informal" rulemaking is a term of art describing rule promulgation by federal agencies pursuant to § 553 of the APA. *See generally* K. Davis, *supra* note 122, §§ 6:1-6:10 (distinguishing between informal, or "notice-and-comment," rulemaking, and formal rulemaking).

[134] *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975).

[135] *See infra* text accompanying notes 140-59.

[136] Prohibition for agency adjudications is at 5 U.S.C. § 554(d); prohibition for formal rulemakings is at *id.* § 557(d). *See also* Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966) (in adjudicatory proceeding, ex parte contacts violate due process); Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 66-67 (D.C. Cir. 1958) (in agency licensing proceeding, ex parte contacts prohibited).

In informal rulemakings, where trial-type, quasi-adjudicatory[128] proceedings are not required, and no "conflicting private claims to a valuable privilege"[129] are involved, the courts have been circumspect about requiring agencies to avoid, or even to docket,[130] ex parte contacts. A notable exception is *Home Box Office, Inc. v. FCC*,[131] in which the D.C. Circuit[132] held that extensive ex parte contacts during a purely informal rulemaking vitiated an FCC rule, necessitating a remand to the Commission.[133]

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[127] *Compare, e.g.*, Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977) (holding that ex parte contacts during informal rulemaking are generally prohibited), *with* Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977) (holding that ex parte contacts during informal rulemaking not involving competing private claims to a valuable privilege generally are not prohibited).

[128] *See* United States Lines v. FMC, 584 F.2d 519 (D.C. Cir. 1978) (quasi-adjudicatory rulemaking, though not "formal" or fully adjudicatory, vitiated by ex parte contacts); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 350 (D.C. Cir. 1978) (adjudicative form of informal rulemaking "lies near the core described by the [ex parte contacts] doctrine's rationales").

[129] Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959); *see also* Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981) (noting that where rulemaking "involves. . .quasi-adjudication among 'conflicting private claims to a valuable privilege' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process") (quoting *Sangamon Valley*); Action for Children's Television v. FCC, 564 F.2d 458, 475 (D.C. Cir. 1977) (dictum) (refusing to vacate FCC informal rulemaking decision, despite extensive ex parte contacts, because rulemaking did not involve "conflicting private claims to a valuable privilege"); *accord* Town of Orangetown v. Ruckelshaus, 740 F.2d 185, 188-89 (2d Cir. 1984).

One might consider exactly what this oft-quoted but rarely analyzed *Sangamon Valley* phrase "conflicting private claims to a valuable privilege" actually means. For example, when an agency proceeding decides whether a high level of worker protection from lead poisoning should be compromised to allow an industry to save millions of dollars, are these not competing private claims to valuable privileges (workers' health versus stockholders' dollars)? For a negative answer, see United Steelworkers of America v. Marshall, 647 F.2d 1189, 1218 n.33 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). Such competing claims to valuable privileges—whose claimants often are readily discernable prior to the rulemaking—may occur in many EPA, OSHA, FDA, and other federal agency informal rulemakings. For example, an EPA standard for ambient levels of particulate matter may determine the future health of tens of thousands of especially pollution-sensitive Americans who are in competition with industrial polluters for the use of a valuable commodity—clean air.

[130] "Docketing" is the practice of placing written materials and summaries of oral communications in a publicly available file.

[131] 567 F.2d 9 (D.C. Cir.) (per curiam), *cert. denied*, 434 U.S. 829 (1977).

[132] The lengthy per curiam decision, although of course unattributed, was "obviously authored" by Judge Wright. J. Mashaw & R. Merrill, Introduction to the American Public Law System 41 (1980 Supp.).

[133] 567 F.2d at 57.

In light of the Supreme Court decision in *Vermont Yankee*,[134] and subsequent D.C. Circuit decisions,[135] the continued vitality of the broad dicta in *Home Box Office* is suspect.[136] Still, in the face of *Vermont Yankee*, at least one court has held that an agency's purely informal rule was vitiated by extensive post-comment-period ex parte communications.[137]

The current law apparently does not prohibit ex parte contacts during informal rulemaking. One common thread in the decisions is that docketing generally is sufficient to avoid reversal of the rule, as long as the docketing occurs in time for full adversarial comment on the new information or argument.[138] Whether docketing is *required* for substantial argumentative or factual contacts in informal rulemaking is controversial.

The principles developed by the courts applicable to ex parte contacts between the decisionmaking agency and outside parties should apply to contacts between OMB staff and outside parties during rulemaking review. This analogy is proper if OMB is either a new decisionmaker or has access to and influences the decisionmaker as an agent for private parties, circumstances which appear to exist.[139]

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[134] 435 U.S. 519 (1978); *see supra* note 120.

[135] *See, e.g.*, Action for Children's Television v. FCC, 564 F. 2d 458 (D.C. Cir. 1977).

[136] For judicial treatment of ex parte contacts after *Vermont Yankee*, see, e.g., Sierra Club v. Costle, 657 F.2d 298, 391-92 (D.C. Cir. 1981); United Steelworkers of America v. Marshall, 647 F. 2d 1189, 1216 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); Hercules, Inc. v. EPA, 598 F.2d 91, 126 (D.C. Cir. 1978); United States Lines v. FMC, 584 F.2d 519, 542 n.63 (D.C. Cir. 1978).

Some commentators suggest that *Vermont Yankee* may have overruled the broad *Home Box Office* language. *See, e.g.*, Carberry, *Ex Parte Communications in Off-the-Record Administrative Proceedings: A Proposed Limitation on Judicial Innovation*, 1980 Duke L.J. 65; Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking: Home Box Office and Action for Children's Television*, 1978 Ariz. St. L.J. 69; Bruff, *supra* note 2, at 503.

[137] Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659-61 (D.D.C. 1978).

[138] *Id.* at 660 ("Where . . . information received *ex parte* is not generated internally by the agency, bears directly on highly complex technical issues, and will probably have some effect on the final outcome [of the rule], it should be revealed for public comment before the agency reaches its decision."); *Home Box Office*, 567 F.2d at 57 (suggesting, in dictum, docketing of ex parte contacts in time for interested parties to comment, should ex parte contacts occur despite prohibition thereon); *see also* Admin. Conference of the United States (ACUS), Recommendation 77-3, 1 C.F.R. § 305.77-3 (1984) (recommending docketing of written communications addressed to the merits of an informal rulemaking, and suggesting that agencies experiment with procedures to disclose oral communications of significant arguments or information from ex parte contacts).

The cases encouraging timely docketing of ex parte contacts accord with the principle of administrative law that information critical to the substance of a proposed rule should be docketed to provide adequate opportunity for comment. *See, e.g.*, United States v. Nova Scotia Food Products Corp., 568 F.2d 240, 252 (2d Cir. 1977) (noting that where FDA apparently relied on certain data not available for public rebuttal, its action was not based on consideration of all relevant factors and was arbitrary).

b. *Principles Undermined by Ex Parte Contacts*

In a complex rulemaking, involving agency personnel in many different capacities, contacts with "decisionmakers" are difficult to avoid and inconvenient to docket. Yet, if undocketed, these contacts impede public participation, reasoned and accountable decisionmaking, and meaningful judicial review. This applies with force to ex parte contacts between OMB and industry.

i. *Ex parte OMB-industry contacts undermine the APA public participation requirements for informal rulemaking.*

When significant arguments or factual information is communicated to decisionmakers during rulemaking and not docketed for public comment, the extensive APA informal rulemaking procedures designed to ensure meaningful public participation in rulemaking[140] may become mere window dressing.[141] The *Home Box Office* court, noting that "[c]ompromises, fall-back positions, and so-called 'real facts' are often reserved" for off-the-record communications,[142] observed that where an agency "relied on these apparently more candid private discussions . . . the elaborate public discussion in these dockets has been reduced to a sham."[143]

The APA's goals of ensuring meaningful public participation in the rulemaking and encouraging full adversarial comment on agency rules argue strongly for disclosure of any significant OMB-industry contact, when OMB is the decisionmaker or a significant influence thereon. Public participation concerns support *a fortiori* a prohibition on post-comment-period ex parte contacts, absent docketing and an opportunity for rebuttal.[144] If a last opportunity to influence the rulemaking is to be available for certain parties, it must be available to all.

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[139] *See infra* text accompanying notes 201-53 (discussing OMB's role as a new decisionmaker) and notes 305-11 (discussing OMB as a conduit from industry to EPA).

[140] *See* 5 U.S.C. § 553.

[141] *See Home Box Office*, 567 F.2d at 53-58; United States Lines v. FMC, 584 F.2d 519, 540 (D.C. Cir. 1978); Environmental Defense Fund v. Blum, 458 F. Supp. 650, 659-61 (D.D.C. 1978); *see also* [J. Skelly] Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 379-82 (1974) (concluding that all relevant information given to the agency should be made available for public comment); Note, *Demise of Effective Public Comment in Informal Rulemaking: Sierra v. Costle*, 18 New Eng. L. Rev. 183 (1982) (arguing informal rulemaking's public comment procedures will be undermined if courts allow unrevealed ex parte contacts). *But see* Carberry, *supra* note 136, at 83-85 (arguing that APA public comment procedures were not intended to compel docketing of ex parte contacts).

[142] 567 F.2d at 56 n.123 (quoting FCC Chairman Wiley).

[143] *Id.* at 54; *see also* United States Lines v. FMC, 584 F.2d 519, 540 (D.C. Cir. 1978) ("[T]he right to comment or the opportunity to be heard on questions relating to the public interest is of little or no significance when one is not apprised of the issues and positions to which argument is relevant . . . . [W]ithout such dialogue any notion of real public participation is necessarily an illusion.").

ii. Ex parte OMB-industry contacts hamper judicial review.

Effective judicial review, as provided for in the APA,[145] requires an accurate record of the arguments and facts before the agency decisionmaker. Without such a record, the court is left to make uninformed guesses about the rationality of agency decisionmaking. For this reason, some courts have required agencies to record, and permit adversarial discussion of, significant ex parte communications between the agency and outsiders.[146]

Judicial review is less meaningful when OMB-industry contacts are not divulged to the court. OMB may be influenced by these contacts, and in turn, the Office may influence EPA decisionmakers or may make its own decisions to veto or otherwise alter an EPA rule.[147] The administrative record delivered to the court by EPA would be a fictitious account of the actual decisionmaking process.

Agencies are required to develop rules on the basis of established statutory criteria; consideration of irrelevant factors may be held to be arbitrary and thus a ground to strike down the rule.[148] Ex parte communications may encourage a decisionmaker to consider statutorily irrelevant factors.[149] In the case of OMB, where the decisionmaker gives preferential access to industry, keeps its contacts secret, and operates under a mandate to cut regulatory costs,[150] infiltration of irrelevant factors is likely. The fear that non-statutory factors will be considered is aggravated by OMB's insistence on reviewing rules, such as National Ambient Air Quality Standards,[151] where the cost considerations mandated by the Executive Order are wholly irrelevant under the applicable statute. The increased likelihood that improper factors will be considered makes a proper record for judicial review that much more important.

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[144] *See* Portland Cement Ass'n v. Ruckelsheus, 486 F.2d 375, 392-93 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974) (data used by EPA but not disclosed in time to permit rebuttal required that the final rule be remanded for rebuttal; rule remanded a second time when EPA failed to explain adequately its rejection of comments); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631-32 (D.C. Cir. 1973) (criticizing EPA's failure to provide opportunity for comment on certain agency methodology).

[145] 5 U.S.C. §§ 704-706.

[146] *See, e.g.*, United States Lines v. FMC, 584 F.2d 519, 541-43 (D.C. Cir. 1978); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345, 351 (D.C. Cir. 1978); *Home Box Office*, 567 F.2d at 54-55; Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659-60 (D.D.C. 1978).

[147] *See, e.g., infra* text accompanying notes 359-65 (discussing review of beverage can surface coating NSPS).

[148] *See* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1970) ("Section 706(2)(A) [of the APA] requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' To make this finding the court must consider whether the decision was based on a consideration of the

iii. Ex parte OMB-industry contacts detract from reasoned decisionmaking.

To assure that agencies engage in reasoned decisionmaking and accurate fact-finding, substantial contacts with outside parties should be divulged.[152] Docketing allows for full disputation of arguments or data proferred during such contacts, and encourages agencies to explain fully their reliance on, or rejection of, those arguments or data.

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relevant factors. . . .") (citation omitted).

[149] *See, e.g.*, *Home Box Office*, 567 F.2d at 54-55 (where there are extensive, undocketed ex parte contacts, "a reviewing court cannot presume that the agency has acted properly. . .but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary"); United States Lines v. FMC, 584 F.2d 519, 541 (1978) ("The agency's secrecy as to *ex parte* communications is particularly troublesome [and] necessarily calls into question whether the justifications put forth by the agency in its decision were in fact its motivating force."); *see also* Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 88 Yale L. J. 194, 198 (1979) ("Permitting ex parte contacts [allows] secret political intervention [which] may interfere with the agency's ability to make a reasoned decision based on the statutory criteria.").

[150] *See infra* text accompanying notes 275-324.

[151] NAAQS primary standards, promulgated pursuant to the Clean Air Act, 42 U.S.C. § 7409(b)(1) (1982), may be based *only* on health considerations. *See* American Petroleum Inst. v. Costle, 665 F. 2d. 1176 (D.C. Cir. 1981); Lead Industries Ass'n v. EPA, 647 F.2d. 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

Despite this clear statutory command, OMB insists on reviewing NAAQS standards. *See* OMB Response to House Questionnaire, *supra* note 83 (Question 16), *reprinted in Hearings*, *supra* note 83, at 981-82; *see also infra* text accompanying notes 371-80 (OMB review of particulate matter NAAQS).

[152] *See Home Box Office*, 567 F.2d at 56 (secrecy interferes "with the ideal of reasoned decisionmaking which undergirds all of our administrative law"); Environmental Defense Fund v. Blum, 458 F.Supp 650, 659-61 (D.D.C. 1978) (citing need for adversarial discussion of complex reports submitted ex parte to EPA).

The "reasoned decisionmaking" rationale for requiring docketing applies particularly to OMB-industry communications. A mission-oriented agency such as EPA reads and analyzes the whole administrative record, and thus is more likely than OMB to consider views and data tending to rebut those which are presented in ex parte contacts. On the other hand, OMB's disproportionate interaction with industry[183] creates a distorted picture in the Office's mind of the rulemaking docket that is before EPA, the reviewing courts, and the public. Further, OMB staff lack substantive expertise in many technical areas of EPA rulemaking,[184] and so may be swayed by sophistic technical arguments not subject to adversarial comment.

iv. Ex parte OMB-industry contacts undermine public policy favoring accountable and open government.

Signing the Government in the Sunshine Act[185] into law, President Ford remarked:

> [T]he decisionmaking process and the decisionmaking business of regulatory agencies must be open to the public . . . . In a democracy, the public has a right to know not only what the government decides, but why and by what process . . . . [It is] America's proud heritage that the Government serves and the people rule.[186]

This rationale undergirds the "Sunshine" Act, the Freedom of Information Act[187] and the APA's notice-and-comment rulemaking procedures.[188]

In keeping with Congress' declaration that it is "the Policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government,"[189] secrecy of government decisionmaking is not lightly to be tolerated. Significant contacts between OMB and outside parties are exactly the kind of "decisionmaking business" that should be carried on in the light of day.

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[183] *See infra* text accompanying notes 282-93.

[184] *See supra* text accompanying note 49.

[185] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. §§ 551, 552, 552b, 556, 557 (1982)).

[186] Government in the Sunshine Act: The President's Remarks Upon Signing S. 5 Into Law, Sept. 13, 1976, 12 Presidential Docs. No. 38, at 1333-34 (1976), *reprinted in* Staff of Senate and House Comms. on Gov't Operations, Government in the Sunshine Act—S.5: Source Book: Legislative History, Texts, and Other Documents 831 (Joint Comm. Print 1976) [hereinafter cited as Sunshine Act Legislative History].

[187] Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (1982)). *But see* 5 U.S.C. § 552(b)(5) (exempting from mandatory disclosure certain intra- and interagency memoranda).

[188] 5 U.S.C. § 553.

[189] Government in the Sunshine Act § 2, 5 U.S.C. § 552b note.

2. *Interagency Contacts*

The President certainly has the power to *participate in* agency rulemaking,[160] and it is assumed *arguendo* that he may delegate that authority to OMB. The focus of this section is not on the propriety of OMB jawboning,[161] but on the potential docketing requirements for OMB-EPA contacts. Few courts have considered thoroughly the propriety of, or the need to docket, contacts between executive agencies during and after the informal rulemaking comment period. No court has discussed whether, under the APA, an agency must disclose in a rulemaking docket OMB communications with that agency.[162]

a. *OMB "Conduit" Contacts with EPA*

Where OMB serves as a mere conduit of information or arguments from private parties to EPA,[163] the question is raised: May a private party simply "launder" its views or data through OMB, and thus avoid public disclosure, critique and possibly judicial review of its position? The courts seem to frown upon conduit contacts, as do several commentators, yet no court has ruled squarely on the propriety of interagency conduit contacts.

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[160] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 404-08 (D.C. Cir. 1981).

[161] See Verkuil, *Jawboning the Administrative Agencies: Ex Parte Contacts by the White House*, 80 Colum. L. Rev. 944 (1980), for discussion of intraexecutive contacts. The *Sierra Club* court offered its view that "unless expressly forbidden by Congress. . .intraexecutive contacts may take place, both during and after the public comment period; the only real issue is whether they must be noted and summarized in the docket." Sierra Club v. Costle, 657 F.2d 298, 405 (D.C. Cir. 1981). The court carefully noted that it was *not* deciding the propriety of "so-called 'conduit' communications, in which administration or interagency contacts serve as mere conduits for private parties." *Id.* at 405 n.520.

See also In Re Permanent Surface Mining Regulation Litigation, 13 Env't Rep. Cas. (BNA) 1586, 1597 (D.D.C. 1979) ("[E]nvironmental[ist] plaintiffs agree that consultation between the President's advisors and other entities in the executive branch is not illegal. Their argument concerns the procedures employed" by agencies engaging in such contacts.).

[162] In Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981), the court considered the propriety of a post-comment-period briefing by EPA for OMB and certain other agency staff under the special Clean Air Act rulemaking procedures. *See* 42 U.S.C. § 7607(d) (1982). A description of this meeting and all materials distributed were placed in the public docket; however, the meeting was only an informational briefing by EPA, and not an arm-twisting session by OMB. 657 F.2d at 388, 404. The court held that the briefing was not improper, but did not speculate as to the propriety of a jawboning session, nor as to the propriety of not docketing the materials distributed in the meeting or a summary of the meeting itself. *Id.* at 404-08.

[163] *See infra* text accompanying notes 305-11; *see also infra* notes 359-65 and accompanying text (discussing beverage can surface coating NSPS).

Language in decisions of the D.C. District Court[164] and the D.C. Circuit[165] indicate that it may be improper for an agency not to summarize and docket conduit contacts received from another executive agency during informal rulemaking. Furthermore, authorities as diverse as the Department of Justice Office of Legal Counsel,[166] the Alliance for Justice (a public interest consortium),[167] and

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[164] In NRDC v. Schultze, 12 Env't Rep. Cas. (BNA) 1737 (D.D.C. 1979), plaintiff environmental groups contended that ongoing ex parte contacts by the President's Council of Economic Advisors (CEA) with Interior Department, Office of Surface Mining (OSM) staff during the rulemaking would taint it. Plaintiffs' request for an injunction on future CEA contacts was denied. The court noted three facts substantially tempering any claim of "irremediable harm" or "patent violation of agency authority":

> a) The Dep't of Interior had consulted with the Dep't of Justice, Office of Legal Council (DOJ/OLC), which advised that post-comment-period intraexecutive comments would be proper, provided a "catalogue" of all oral and written communications between CEA and outside parties was docketed at the Department of Interior. This would prevent CEA from being a conduit for private parties. *Id.* at 1738;
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> b) The DOJ/OLC memorandum advised OSM that any of the CEA-OSM contacts (described by the court as "extremely limited") that were part of the basis for a change in the rule should be revealed by OSM for the public record. There was no reason to believe OSM would not comply. *Id.* at 1739-40;
>
> c) OSM did indeed fully disclose all communications between CEA and the public, "most of which were duplicative of material in OSM files." *Id.* at 1740 n.9.

In a related case, *In Re* Permanent Surface Mining Regulation Litigation, 13 Env't Rep. Cas. (BNA) 1586, 1597 (D.D.C. 1979), environmentalists charged that interexecutive post-comment-period ex parte contacts between CEA and the Interior Department compromised statutorily required citizen participation in the development of state surface mine regulations. The court granted a limited motion for discovery, enabling the environmental plaintiffs to discover whether any documents had been presented off-the-record by private parties to CEA without the opportunity for adversarial comment.

The reliance of both the *NRDC* and *Permanent Surface Mining* opinions on the DOJ/OLC advice that all conduit contacts be fully docketed with opportunity for public comment is clear. What is not readily apparent is how the courts would have dealt with the interexecutive contacts absent the docketing measures implemented at the suggestion of the DOJ/OLC. It seems likely that docketing is advisable to avert reversal in the case of a significant conduit contact.

[165] *See, e.g.*, Sierra Club v. Costle, 657 F.2d 298, 405 n.520 (D.C. Cir. 1981) ("We note that the Department of Justice, Office of Legal Counsel has taken the position that it may be improper for White House advisers to act as conduits for outsiders, [but plaintiff] has given us no reason to believe that a [docketing] policy. . .was not followed here, or that unrecorded conduit communications exist in this case.").

[166] *See* Larry Hammond, Dep't of Justice, Office of Legal Counsel (DOJ/OLC), Re: Consultation With Council of Economic Advisers Concerning Rulemaking Under Surface Mining Control and Reclamation Act (memorandum to Hon. Cecil D. Andrus, Interior Secretary), *reprinted in* Legal Times of Washington, Jan. 29, 1979, at 32-33 [hereinafter cited as Carter admin. DOJ/OLC memo]:

> The rulings of the D.C. Circuit, however, do suggest that it might be inappropriate

the Administrative Conference of the United States (ACUS)[168] seem to recognize that significant interagency conduit contacts should be docketed, if not prohibited.[169] OMB seems prepared to accept a legal requirement to docket written factual conduit contacts.[170]

The reasons for docketing substantial conduit contacts are the same as those for docketing any ex parte contacts from private parties: full public participation, meaningful judicial review, and political accountability.[171] In addition, it is important that OMB inform EPA of the source of its comments; comments assumed to be from OMB are likely to be accorded greater significance by EPA than those known to be from a private party.

b. Non-conduit Interagency Contacts

i. Sierra Club v. Costle.

Few decisions discuss disclosure of interagency contacts during rulemaking, and none of them is directly on point.[172] The most important is *Sierra Club v. Costle*.[173] The *Sierra Club* court refused

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> for interested persons outside the executive Branch to have so-called *ex parte* communications with you and your staff. If that is so, we think it logical to conclude that the D.C. Circuit would disapprove of CEA or other advisers to the President serving as a conduit for those same *ex parte* communications.

The DOJ/OLC under the Reagan administration apparently has a different view of the case law. In an April 24, 1981, memorandum from Assistant Attorney General Theodore Olson of DOJ/OLC to David Stockman, OMB Director (copy on file with author) [hereinafter cited as Reagan admin. DOJ/OLC memo], the OLC does not suggest that the D.C. Circuit would disapprove of OMB as a conduit. The memorandum does conclude, however, that all *factual* contacts between OMB and an agency, and all OMB contacts which "are 'conduit' transmissions of views or information from persons outside of Executive or independent agencies" should be docketed.

[167] *See* C. Ludlam, Undermining Public Protections: The Reagan Administration Regulatory Programs: A Report by the Alliance for Justice 40-42 (1981).

[168] ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (*All* communications from the President, advisors to the President, the Executive Office of the President, or other administrative bodies "containing or reflecting comments by persons outside the government" should be identified and docketed.).

[169] Both the Carter administration DOJ/OLC, *see supra* note 166, and the Alliance for Justice, *see* C. Ludlam, *supra* note 167, suggest that conduit contacts may be prohibited.

[170] *See infra* text accompanying note 299.

[171] *See supra* notes 140-59 and accompanying text.

[172] The D.C. Circuit twice has skirted the issue of whether Executive Office communications with a regulating agency must be summarized and made available to the public. Both decisions rely on procedural defects in petitioners' efforts to compel disclosure of and public comment on the contacts. *See* American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); Nader v. Volpe, 466 F.2d 261 (D.C. Cir. 1972).

[173] 657 F.2d 298 (D.C. Cir. 1981).

to prohibit interagency, intraexecutive post-comment-period meetings,[174] but noted that docketing of such lower-level intraexecutive meetings *may* be necessary in some circumstances.[175]

Judge Wald pointed out that EPA had voluntarily docketed summaries of each of these intraexecutive agency meetings.[176] Nevertheless, to ensure the adequacy of the record, the court required EPA to file affidavits further discussing the substance of several post-comment-period meetings.[177] The court was not presented with, and therefore did not rule on, the propriety of *undocketed* interagency communications; all of the interagency contacts considered by the court had been summarized for the public docket, albeit in some cases after the close of the comment period.[178]

ii. OMB executive privilege?

A question may arise where non-conduit, policy-oriented communications involving executive branch officials are involved: Is the constitutionally based presumptive "executive privilege" for presidential communications, announced by the Supreme Court in *United States v. Nixon*,[179] available to OMB as an arm of the Executive Office?

The *Nixon* Court repeatedly noted that it was considering a

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[174] *Id.* at 404-05.

[175] *Id.* at 406-07. It should be remembered that the Clean Air Act's procedural provisions, 42 U.S.C. § 7607(d) (1982), *not* the APA's informal rulemaking provisions, 5 U.S.C. § 553 (1982), were under consideration in *Sierra Club*. 657 F.2d at 391-96. The Clean Air Act, for instance, instructs reversal of EPA action only if procedural "errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). Furthermore, the Act appears to exclude from the record for judicial review many EPA-OMB communications. *See id.* § 7607(d)(4)(B)(ii) (requiring docketing of such contacts); *id.* § 7607(d)(7)(A) (excluding such contacts from the record).

[176] Summaries of all post-comment-period intraexecutive meetings, save the single meeting with the President and one with staff members of the Senate Environment and Public Works Committee, were docketed by EPA. 657 F.2d at 387-89, 404.

[177] *Id.* at 389-91 & n.450. The court denied plaintiffs' motion for further discovery related to these meetings, absent "the requisite showing of bad faith or improper conduct which would create serious doubts about the fundamental integrity of [the] rulemaking proceeding." *Id.* at 348-50.

On the use of affidavits to discover the effects of ex parte contacts, see McMillan & Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-Finding During Judicial Review of Informal Agency Action*, 1982 Duke L.J. 333, 348-49.

[178] 657 F.2d at 400.

[179] 418 U.S. 683, 708 (1974) (presumptive privilege of President's communications outweighed by need of judiciary to do justice in criminal prosecution).

"presumptive privilege of *Presidential* communications,"[180] and that its decision was informed by "[t]he *President's* need for complete candor and objectivity from advisers."[181] In general, the courts have held that a claim of executive privilege may be asserted only by the President, or by the head of an executive department who has personally participated in the decision to assert the privilege.[182]

Discussing the privilege for executive communications, the *Sierra Club* court noted that it was considering "a face to face policy session involving the President," and that "the President himself [was] directly involved" in the sole undocketed meeting of substance.[183] The court's emphasis on personal presidential participation in the undocketed meeting perhaps implies a privilege distinction between presidential communications and communications involving only lower-rank executive officials.

The rebuttable[184] presumption of executive privilege accorded to *presidential* communications logically must attenuate, eventually to inconsequence, as executive authority is delegated farther from the Oval Office (for instance, to OMB staff). This attenuation is analogous to the attenuation of civil immunity for official acts.[185]

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[180] *Id.* (emphasis added). In another passage of the opinion, the Court accepted President Nixon's argument that there exists a "valid need for protection of communications between high Government officials and those who advise and assist them," *id.* at 705, but went on to explain that any "privilege of confidentiality of *Presidential* communications in the exercise of Art. II powers" must be inferred from the Constitution, on the basis of the privileges flowing from the President's enumerated powers, *id.* (emphasis added).

On the constitutional basis for a presidential privilege, see Berger, *Executive Privilege: A Presidential Pillar Without Constitutional Support*, 26 Vill. L. Rev. 405 (1980-81) (cautioning against over-extension of executive privilege doctrine).

[181] 418 U.S. at 706 (emphasis added).

[182] *See* United States v. Reynolds, 345 U.S. 1, 7-8 (1953) (there "must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer"); Black v. Sheraton Corp. of America, 564 F.2d 531, 543 (D.C. Cir. 1977) ("It is. . .essential that the affidavit [claiming executive privilege] be based on actual personal consideration by the affiant official. . .and that it explain why the specified documents properly fall within the scope of the privilege. . . .What the situation required was the sworn statement of the appropriate Cabinet officer. . . .").

[183] 657 F.2d at 407.

[184] *See, e.g., Nixon,* 418 U.S. at 708; Sun Oil Co. v. United States, 514 F.2d 1020, 1024 (Ct. Cl. 1975).

[185] *Compare* Nixon v. Fitzgerald, 102 S.Ct. 2690, 2701-02 (1982) ("[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. . . . The President's unique status under the Constitution distinguishes him from all other executive officials.") *with* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2734 (1982) ("Having decided. . .that members of the Cabinet ordinarily enjoy only qualified immunity from suit we conclude today that it would be equally

Many have argued for at least partial disclosure of White House staff communications during rulemaking.[166] Empirical observation of OMB E.O. 12,291 review suggests that such proposals deserve to be implemented.

III. OMB REVIEW OF EPA RULES: SOME EMPIRICAL OBSERVATIONS

This section looks at OMB review under the auspices of E.O. 12,291. First, a brief overview of OMB review of all executive agency rules is provided. The section then discusses OMB's de facto veto power over EPA rules, and OMB's more subtle—and more pervasive—use of its powers to influence EPA rulemaking. OMB often bases its review on non-statutory criteria, in violation of the Executive Order, and sometimes serves merely to launder industry arguments on their way to EPA. OMB conducts its review behind a veil, thus making its influence difficult for courts, Congress, the public and even EPA to judge. Case studies of several EPA rulemakings bear out these observations.

A. *Overview*

According to OMB, Executive Order 12,291 has "reduce[d] the burden of Federal regulation on the American public" and has "sharply curtailed" what it calls "the proliferation of new Federal regulations."[167] OMB asserts that its reform efforts "have achieved estimated savings in unnecessary costs totaling $9 to $11 billion for one-time capital expenditures and $6 billion in recurring annual costs."[168]

While these cost savings may appear impressive, congressional critics have excoriated OMB for its method of calculating savings

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untenable to hold absolute immunity an incident of the office of every Presidential subordinate based in the White House.").

[166] *See* Verkuil, *supra* note 161 at 987-89 (recommending that presidential oral contacts be fully privileged from disclosure, but that White House staff *written* contacts be docketed, and staff *oral* contacts be noted on the record but not summarized); Bruff, *supra* note 2, at 504 ("[I]nstead of seeking to prevent ex parte communications from the White House during the rulemaking period, they should be encouraged but channeled into the public record."); ACUS Recommendation on Intragovernmental Communications in Informal Rulemaking, Rec. No. 80-6, 1 C.F.R. § 305.80-6 (1984) (favoring docketing of Executive Office communications containing "material factual information" or "reflecting comments by persons outside the government").

[167] OMB, Executive Order 12291 on Federal Regulation: Progress during 1982, at 4 (April 1983) [hereinafter cited as OMB 1982 Report on 12,291].

[168] *Id* at 5.

achieved through E.O. 12,291. Such criticism has elicited reluctant admissions from OIRA's former Administrator that estimates "were mainly from industry sources," that estimates did not consider benefits of the regulations in place, and that, on the whole, "[i]t is conceivable" that OMB's regulatory reform efforts may have saved nothing and may have cost the American public.[189] Whatever the truth about savings resulting from OMB's efforts—which probably rests between critics' claims of negative benefits and OMB's bloated estimates—it is clear that OMB has substantially influenced the pace and substance of executive agency rulemaking.

In 1981 and 1982, OMB reviewed over 5,400 proposed and final regulations; roughly 140 of these were "major" rules.[190] About twenty percent of all rules reviewed by OMB were EPA rules;[191] eight of these 1074 EPA rules were designated "major" under the Executive Order.[192]

While, as of 1982, eighty-six percent of all draft rules sent by agencies to OMB had been "cleared without change,"[193] it is likely that OMB had some impact on their substance. Often the Office is in close contact with the agency staff drafting the rules, and sometimes helps to fashion the proposal before it is "logged" for review.[194] Roughly eight percent of all rules reviewed by OMB in 1981 and 1982 were found "consistent with minor change,"[195] sometimes undergoing "substantive modification."[196]

As of the end of 1982, 101 regulations—or two percent of those reviewed by OMB—were returned to the agencies;[197] "returned" in some cases is a euphemism for "vetoed."[198] Agencies had withdrawn eighty-one rules, in some cases upon receiving signals from OMB of an impending dispute.[199]

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[189] *Hearings on Role of OMB, supra* note 31, at 114-15.

[190] Presidential Task Force on Regulatory Relief, Reagan Administration Regulatory Achievements 59-61 (Aug. 11, 1983) [hereinafter cited as 1983 Task Force Report]. OMB may "exempt" classes of rules from review if it determines that "as a class" they are consistent with the goals and requirements of the Order. Furthermore, a rule may be returned to an agency because it was improperly sent, or it may be passed through OMB due to an emergency or a statutory or judicial deadline. During 1981 and 1982, three percent of all rules fell into these categories. OMB 1982 Report on 12,291, *supra* note 187, at 11, 27.

[191] OMB 1982 Report on 12,291, *supra* note 187, at 11, 27.

[192] *Id.* at 59.

[193] *Id.* at 11.

[194] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *accord* Telephone interview with Allan Jennings, EPA Office of Standards & Regulations (May 27, 1983); *see also* GAO Report on 12,291, *supra* note 24, at 53. EPA's High Level Radioactive Waste Disposal rule, *see infra* text accompanying notes 326-49, is one example of a rule substantively modified before proposal, after OMB review.

[195] OMB 1982 Report on 12,291, *supra* note 187, at 11.

[196] Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), *reprinted in Hearings, supra* note 83, at 2642.

The primary macroscopic impacts of the Executive Order appear to be delay of the regulatory process—especially where OMB and the agency disagree on the substance of a rule—and the day-to-day infusion of OMB input into agency decisionmaking.[200] This OMB input generally is difficult if not impossible for the public to discern.

B. OMB Encroachment on EPA Discretion: A New Locus of Power

The struggle between EPA and OMB has at times become embittered. Former EPA Administrator Burford recently testified, for example, that "it is appropriate for the President of the United States to have an office which can overview [sic] regulations. . .but I think that there were some serious abuses [by OMB]."[201] Some EPA employees long have contended that the agency has been "singled out" by OMB for especially close scrutiny;[202] OMB admits that it gives EPA special attention.[203]

The friction between OMB and EPA is not surprising. OMB has openly criticized the entire health and environmental regulatory regime.[204] It has charged that EPA's management has tried to evade OMB oversight.[205] EPA's orientation toward "command and control" regulation often runs directly against the grain of OMB's market-oriented approach. A key former OMB official admits that OMB has "a loving bias against regulation . . . a rebuttable presumption against regulation," but insists that this bias results from OMB's "neutral competence" rather than from any pro-industry bent.[206]

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[197] OMB 1982 Report on 12,291, *supra* note 187, at 11.

[198] *See infra* text accompanying notes 209-14.

[199] OMB 1982 Report on 12,291, *supra* note 187, at 11.

[200] *See infra* text accompanying notes 246-53 (discussing internal EPA changes in response to OMB review).

[201] *Hearings on Superfund, supra* note 46, at 234 (testimony of Anne Burford).

[202] *See Special Report: Office of Management & Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 1976 Env't Rep. (B.N.A.) 693.

[203] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[204] For example, OIRA Administrator DeMuth asserted: "[T]here are scores, hundreds of regulations on the books that are imposing costs without much positive results in terms of environmental or health improvements. . . ." *Office of Management and Budget Control of OSHA Rulemaking: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 97th Cong., 2d Sess. 347 (1982) (testimony of OMB, OIRA Adm'r DeMuth) [hereinafter cited as *Hearings on OMB Control of OSHA Rulemaking*]. *See also* J. Lash, K. Gillman & D. Sheridan, A Season of Spoils 19-21 (1984) (citing criticism of environmental regulation by top-level OMB officials, including Director Stockman) [hereinafter cited as J. Lash].

[205] *See, e.g., OMB Midterm Analysis Gives EPA Poor Marks on Reg Reform, Other Programs*, Inside EPA (Inside Wash. Pubs.) 1, 5 (Nov. 12, 1982) (quoting internal OMB

As the following sections illustrate, OMB's philosophical bias against command and control regulation has led the Office to frequent, at times vehement, arguments with EPA. These disagreements have often resulted in substantive changes in EPA's rules.

1. *OMB's De Facto Veto Power: The Displacement of EPA Discretion*

The terms of Executive Order 12,291 give OMB no authority to "veto" an agency rule; the Order merely provides that the agency "shall . . . refrain from publishing" its rule "until the agency has responded to the [OMB] Director's views, and incorporated those views and the agency's response in the rulemaking file."[207] The Order explicitly states that it shall not "be construed as displacing the agencies' responsibilities delegated by law."[208]

In practice, however, OMB has acquired a de facto veto power over certain agency regulations. OMB officials have essentially admitted to such power in testimony before Congress.[209] Although a

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memorandum):

> EPA has resisted White House efforts to promote reform of environmental regulations. The agency's attempts to circumvent White House oversight of its regulatory activities has resulted on one or two occasions in considerable political embarrassment to the Administration. All of this could have been counteracted by sufficiently forceful action on the part of EPA's political appointees, but they appear unable to debunk the assertions of their staff, or to focus on the most important opportunities for regulatory reform.

[206] Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

[207] E.O. 12,291, *supra* note 1, § 3(f)(2).

[208] *Id.* § 3(f)(3).

[209] *See, e.g.*, *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 350 (testimony of OMB, OIRA Adm'r DeMuth):

> *Mrs. Collins*. . . .When OMB disagrees with an agency and feels that a standard does not comply with the cost-benefit analysis, based on Executive orders, could that agency actually proceed to implement it, or target [sic] a standard anyway?
>
> *Mr. DeMuth*. Sure.
>
> *Mrs. Collins*. It could. Do you know of any that have done that?
>
> *Mr. DeMuth*. No. Wait a minute, let me think. No, I think the answer is "No."

But see Hearings, *supra* note 83, at 966 (OIRA Adm'r DeMuth, testifying that "OMB does not have 'veto power' over rules").

determined agency may be able to reject OMB's "recommendations" and promulgate the rule intact, OMB ~~has~~ publicly cited only a single instance in which an agency brought a dispute with the Office to the Presidential Task Force on Regulatory Relief[210]—the now-disbanded "appeals board" from OMB decisions under the Executive Order.[211] None of the forty-five rules "returned" to the agencies by OMB in 1981 was appealed to the Task Force.[212]

When asked in August 1983 how many rules returned to agencies were later promulgated, OMB could not cite a single rule, ostensibly because they "do not maintain records" of such cases.[213] In the view of former OIRA Administrator Miller, agencies generally are unlikely to test OMB's bureaucratic mettle, because "if you're the toughest kid on the block, most kids won't pick a fight with you. The executive order establishes things quite clearly."[214]

Although OMB is indeed a "tough kid," its experience with the Executive Order demonstrates that the Office is neither omnipotent nor prodigal in the use of its powers. For example, when OMB attempted in a drawn-out battle to pressure EPA into significantly relaxing the standards for lead in gasoline—the "lead phasedown" debate—OMB, in the words of former EPA Assistant Administrator Bill Drayton, "was rolled."[215] That OMB is not prodigal in exercise of its powers is illustrated by the fact that in 1981 and 1982 it returned only thirty-one of the 1074 EPA rules reviewed.[216]

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[210] In the spring of 1982, OMB opposed OSHA's "Hazard Communication" rule, and OSHA appealed to the Task Force. The Task Force upheld the rule, although the standard ultimately differed from the original OSHA proposal. Perhaps it is no coincidence that the Task Force's approval occurred during a congressional inquiry into OMB's delay of the rule. *See Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, 4-5, 20-26, 55, 316-19; *see also* GAO Report on 12,291, *supra* note 24, at 53.

[211] *See* E.O. 12,291, *supra* note 1, § 6 (setting forth role of Task Force). The Task Force was disbanded in August 1983. Wash. Post, August 12, 1983, at A-15, col. 4-5.

[212] GAO Report on 12,291, *supra* note 24, at 53.

[213] OMB Response to House Questionnaire, *supra* note 83 (Question 7), *reprinted in Hearings*, *supra* note 83, at 976.

[214] *Deregulation H.Q.: An Interview on the New Executive Order With Murray L. Weidenbaum and James C. Miller III*, Reg., Mar.-Apr. 1981, at 22 [hereinafter cited as *Deregulation H.Q.*].

[215] Telephone interview with William Drayton, Jr., former EPA Ass't Adm'r for Planning & Mgmt. (April 28, 1983).

[216] OMB 1982 Report on 12,291, *supra* note 187, at 10-12. This figure is misleading because most of the thousand-odd rules sent by EPA to OMB are of minor significance; only perhaps a fourth or less are of substantial influence, and only a handful were designated "major." *See Hearings*, *supra* note 83, at 3146-3215 (worksheet of proposed and final EPA rules received by OMB through April 30, 1983, for E.O. 12,291 review) [hereinafter cited as *OMB Worksheet*].

A key OMB official explains that it requires "too many bureaucratic chips" for OMB to insert itself into and possibly polarize many rulemakings and to "bring in the heavies" too often.[217] When OMB does bring its power to bear, however, it often is very influential.[218]

OMB's power to "return" rules[219] is analogous to the President's power to veto legislation. If the agency writing the rule can muster enough will and political support to override OMB, it will prevail, much as Congress may override a presidential veto. But, the threat of an OMB veto probably has its greater effect in a day-to-day sense, as a threat looming on the horizon. Its mere existence gives OMB the power to influence EPA policymaking.

Of course, OMB has many powers other than the power to return a rule with which it can encourage EPA to alter its course. OMB sanctions include budget and personnel cuts, and delay of future rules.[220] An additional sanction, presidential dismissal of the EPA Administrator, is an extraordinary measure.[221] Perhaps a further power is illustrated by former EPA Chief of Staff John Daniel's recent testimony that he received "veiled threats" when EPA took actions objectionable to OMB.[222] After EPA Administrator Burford issued a rule under court order without first receiving OMB approval, Daniel explained: "Late that evening I received a call from an OMB official . . . [who said] words to this effect[:] that there was a price to pay for doing what we had done, and that we hadn't begun to pay."[223]

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[217] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

[218] *See infra* Section III.D., Case Studies.

EPA's Administrator Ruckelshaus, recently resigned, may have been more independent of OMB and the White House than was his predecessor or will be his successor. When quizzed by Senator Stafford about his views on OMB's power, he asserted: "I will have the final authority to promulgate regulations, not OMB." Written responses of William Ruckelshaus, EPA Adm'r-designate (Question 7; (written questions of Sen. Stafford following confirmation hearings) (undated) (copy on file with author).

However, a recent review by the Oversight and Investigations Subcommittee of the Senate Energy and Commerce Committee concludes: "[I]t seems quite clear that the problem of OMB interference in EPA rulemaking has not ceased with the shakeup of the top leadership of the Environmental Protection Agency in early 1983." Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 293. The ability of Administrator-designate Lee Thomas to resist OMB influence remains to be seen.

[219] When OMB decides to return a rule to EPA, the Desk Officer usually drafts a memorandum recommending return of the rule as inconsistent with the Executive Order. That memorandum climbs the OMB chain of command and ultimately may lead to a letter to EPA, usually from the OIRA Administrator, notifying the Agency of OMB's determination that the rule is inconsistent with the Executive Order. Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[220] As discussed *supra* text accompanying notes 5-17, OMB may combine its vast array of powers with the veto threat to effectively persuade EPA. No *overt* threats of such sanctions have been cited by EPA officials in interviews, but the mere existence of such powers may have a chilling effect on EPA's willingness to contravene OMB orders. "[T]housands of transactions a year with OMB" take place; therefore "if you've publicly humiliated [OMB], they'll get even—this can come in many different ways." Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

[221] Former EPA Administrator Costle notes that the actual *firing* of the EPA Administrator is not a real threat—absent a major political crisis—because of the extraordinary nature of this remedy. *Id.*

2. *OMB's More Subtle & Pervasive Influence on EPA*

As noted, OMB only rarely resorts to vetoing EPA rules; the veto appears to be its bluntest weapon, to be used only when EPA resists OMB arm-twisting and refuses "voluntarily" to alter a rule's substance. This section reveals the day-to-day influence OMB exerts on EPA rulemaking short of a management-level veto.

a. *Early OMB Involvement in EPA Rulemaking*

There is "an old OMB saying: get in below the bow line"; in other words, get involved in agency rulemaking as early as possible to maximize influence on rules that are still in their formative stages.[224] To this end, there are reports that OMB is planning to use the "unified agenda of federal regulations" mandated by § 5 of E.O. 12,291 to involve itself in "ground-floor" decisions on whether proposed rules should even be drafted by agencies.[225]

In many cases OMB already is involved in the EPA rulemaking process prior to formal submittal of a proposed rule to the Office. An excellent example of this is the early OMB involvement in the National Ambient Air Quality Standard (NAAQS) for particulate matter; OMB was involved for over a year before any proposal was floated by EPA.[226]

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[222] *Daniel Testimony*, *supra* note 46, at 7.

[223] *Id.* at 7-8.

[224] Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (May 14, 1983).

[225] *OMB Gearing to Control Agency Decisions at the Earliest Stage*, Inside OMB (Inside Wash. Pubs.) 5 (Oct. 8, 1982). OMB would accomplish this through review of all agency rules planned and placed on the regulatory agenda; if OMB were to find that "policy issues" were raised by the agency's planned rulemaking, the regulatory plan would be brought to the attention of OMB for an overall decision on whether to begin the regulatory process. This would be the first step toward establishing "regulatory budgets" for agencies. *Id.*

[226] *See* NAAQS case study, *infra* text accompanying notes 371-80. The rule was finally proposed on March 20, 1984. *See* 49 Fed. Reg. 10,408 (1984).

This pre-proposal input is critical because, once the inertia builds after proposal of a rule, it takes many more "bureaucratic chips" for OMB to halt or significantly alter the EPA rule. One observer of the OMB-agency debates explains, "[B]y the time that [a] standard is issued as a proposal in many agencies' views, it is nailed down . . . [the] proposal is close to, if not identical to, the agency's final action."[327]

Under EPA's formal procedures OMB clears a proposed or final regulation, and the EPA Administrator signs it.[328] This may avoid the appearance of OMB overriding the EPA Administrator, but it also precludes a "pure" EPA rule—the rule is always the joint product of OMB and EPA before it actually reaches the Administrator's desk for signature. OMB review is completed *prior to* the EPA Administrator's signature. While this is procedurally courteous, the Administrator often is fully aware of—and indeed completely supports—a rule that has gone through internal low level review *before* it is sent to OMB.[329]

Early OMB involvement compromises EPA's role as the front-line expert decisionmaker in matters entrusted to EPA by Congress. EPA's former Assistant Administrator Drayton feels that early OMB input over-politicizes the EPA background scientific work before it has had a chance to see the light of day.[330] This directly undercuts the ideal mode of regulation: first, expert determination of risks, and then, a policy decision as to what level of risk is acceptable.[331]

b. Day-to-Day OMB Review of EPA Rules

Once formally submitted to OMB, non-major EPA rules are in most cases cleared within ten days.[232] If the rule is controversial, however, copies of the rule may be sent to key White House and other executive staff, and review may take several months or more than a year.[233]

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[327] *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 12 (testimony of Peg Seminario, AFL-CIO).

[328] *See* EPA, Office of Standards and Regulations, Managing the Process 51-52 (August 1982) (Regulation Management Series).

[329] The EPA High Level Radioactive Waste Disposal rule, for example, was fully supported by EPA Administrator Burford, who personally debated its provisions with OMB officials during OMB's extended one-year review. *See infra* text accompanying notes 329-46.

[330] Telephone interview with William Drayton, Jr., former EPA Ass't Adm'r for Planning & Mgmt. (April 28, 1983).

[331] For an excellent treatment of how the ideal federal agency's risk assessment and risk management decisionmaking might proceed, see National Academy of Sciences, National Research Council, Risk Assessment in the Federal Government: Managing the Process (1983). See especially *id.* at 33-49, discussing the interplay between science and policy in risk assessment and regulation.

OMB review of most non-major rules must be cursory because of the volume of rules to be reviewed.[234] "Major" rules receive substantially more scrutiny; the average time for review is over thirty days.[235]

Because of time constraints, and because OMB sees itself as an overseer of the process rather than a "bunch of technicians redo[ing] the work of EPA,"[236] OMB almost never looks at the EPA rulemaking docket or at any public comments other than those sent directly to OMB.[237] OMB does accept, and sometimes actively solicits, industry comments both written and oral;[238] on rare occasions OMB receives comments from non-industry parties, but in general the "record" before OMB is distinctly one sided.[239] EPA officials have charged that OMB has given draft EPA rules to industry for comment before the rules are available to the public,[240] presenting industry a secret "first shot" at the rules.

c. *Delay in the Regulatory Process*

OMB's quick turnaround for most EPA regulations is only a part of the story. For those regulations with which OMB disagrees, review is neither smooth nor predictable. Regulatory packages sent to OMB may become enmeshed in disagreement for over a year.[241] EPA reported in May 1983 that OMB had extended its review of 158 proposed and final rules beyond the time limits prescribed in the Executive Order, sometimes for several months, and in four cases for over a year.[242]

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[232] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *see OMB Worksheet*, *supra* note 216.

[233] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

[234] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[235] *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 302 (testimony of OMB, OIRA Adm'r DeMuth).

[236] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[237] Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); *see also* J. Lash, *supra* note 204, at 24:

> The long rulemaking record, the legal basis of the rule, the opportunity for public comment were just too cumbersome for OMB. "We should read the record," says [former OIRA Deputy Administrator] Tozzi, "but we didn't." When OMB reviews a rule, [former OIRA Administrator] Miller testified, "we are not evaluating a record."

[238] *See infra* text accompanying notes 282-96.

[239] In response to the author's FOIA request, for example, OMB produced scores of letters, fact sheets, and other documents which oil refiners, lead producers and other industrial interests sent to OMB advocating relaxation or rescission of a single EPA rule, the gasoline "lead phasedown" regulations. Materials provided pursuant to author's FOIA request (June 13, 1983) (on file with author).

[240] *See, e.g.*, *Daniel Testimony*, *supra* note 46, at 5, 80.

For a discussion of OMB solicitation and acceptance of industry comments on EPA rules, see *infra* text accompanying notes 282-96.

Once OMB announces an extension, there is no time limit on OMB review. In some cases, OMB has extended its review well beyond the statutory deadline for a rule's promulgation,[243] despite the Order's clear mandate that such deadlines be honored.[244]

Interagency dispute produces delay and incremental, sometimes substantial, change in the rule or proposal. Although relatively few rules are delayed for more than ten weeks, many of those rules are from EPA.[245]

d. *Internal Changes at EPA as a Consequence of OMB Review*

As this section attempts to demonstrate, direct OMB intervention results in EPA policy changes. In addition, the very knowledge that rules will be reviewed by OMB has brought about internal changes at EPA.

First, a more rigorous internal review has developed.[246] EPA has beefed up its economic analyses; in fact, by May 1983 EPA had spent $2.45 million on the still-uncompleted Regulatory Impact Analysis (RIA) for RCRA owner/operator land disposal standards.[247] The Reagan Order requires that considerable analysis be undertaken; however, in general, EPA staff interviewed believed that a full-blown cost-benefit RIA is of little value to EPA decisionmakers and is essentially a waste of EPA's scarce resources.[248]

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[241] *See, e.g.*, discussion of OMB's year-long reviews of EPA's High Level Radioactive Waste Disposal rule and NSPS's, *infra* text accompanying notes 326-70.

[242] Letter from Joseph A. Cannon, EPA Assoc. Adm'r, Policy and Resource Mgmt., to Hon. Sam B. Hall, Chm'n, House Subcomm. on Admin. Law and Govtl. Relations (May 26, 1983) (enclosure) (Questions 5a.(6), 5b.(6)), *reprinted in Hearings*, *supra* note 83, at 1561-62 [hereinafter cited as EPA Response to House Questionnaire].

[243] *See, e.g.*, NSPS case study, *infra* text accompanying notes 350-70 (noting that several of these rules were delayed by the OMB review process for months, even more than a year, after the statutory deadline had passed).

[244] E.O. 12,291, *supra* note 1, § 8(a)(2).

[245] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[246] Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

[247] EPA Response to House Questionnaire, *supra* note 242 (Attachment K), *reprinted in Hearings*, *supra* note 83, at 1615-18.

EPA's more rigorous internal review has increased significantly the time it takes to issue some rules. The drafting of the RIA's for two major rules, for example, have taken in excess of two years.[249] In 1982, General Accounting Office (GAO) investigators found in general that "the knowledge that all regulations must be reviewed by OMB may indirectly cause delay" due to intensified internal review within the agency.[250] A more recent GAO study concluded that while cost-benefit analyses may be time consuming, costly and flawed by significant data gaps, in some cases these analyses have aided EPA decisionmakers.[251]

A more subtle and consequential internal EPA development induced by OMB review is a "guessing game," in which EPA attempts to draft rules it believes will clear OMB. As one EPA official put it, "we are practicing the art of the possible": the agency staff starts with reduced expectations, and drafts initially a proposal that will clear both the EPA hierarchy and OMB.[252]

The Executive Order has effectively institutionalized OMB input, especially where OMB has a strong policy interest. Of course, most rules receive little OMB attention. It is, however, OMB's goal to induce in EPA staff the understanding that rules in certain form will never clear OMB, and therefore should not even be sent there for review.[253] This goal seems to have been at least in part achieved.

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[248] *E.g.*, Interview with EPA, Office of Standards & Regulations Official "D" in Washington, D.C. (March 30, 1983). Publicly, EPA states that the cost-benefit analyses have been useful to the agency. *See, e.g.*, Letter from John M. Campbell, Jr., EPA Acting Ass't Adm'r for Policy, Planning & Evaluation, to J. Dexter Peach, GAO (Oct. 20, 1983), *reprinted in* GAO, Cost-Benefit Analysis Can Be Useful in Assessing Environmental Regulations, Despite Limitations 40-41 (1984) ("In general, EPA agrees with GAO in its finding that cost-benefit analysis is a useful tool in considering options for setting standards despite some inherent limitations.") [report hereinafter cited as GAO Report on Cost-Benefit Analysis].

[249] EPA Response to House Questionnaire, *supra* note 242 (Attachment C), *reprinted in Hearings*, *supra* note 83, at 1595-97; *accord* Telephone interview with EPA, Office of Policy & Resource Management Official "I" (May 31, 1983).

[250] GAO Report on 12,291, *supra* note 24, at 51.

[251] GAO Report on Cost-Benefit Analysis, *supra* note 248.

[252] Interview with EPA, Radiation Programs Official "K" in Arlington, Va. (May 24, 1983).

[253] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983). OMB officials will on occasion tell EPA that it is "O.K. to propose" x and/or y, "but be forewarned that we're looking for x" in the final rule. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983). The official noting this practice did not suggest how often or in what cases it is invoked. If used effectively, it would directly undercut the APA public comment process.

3. OMB Review: Not Limited by Statutory Criteria or the Terms of the Executive Order

a. OMB Review Effectively Ignores Relevant Statutes and the Terms of the Executive Order

Executive Order 12,291 grants OMB review powers only "to the extent permitted by law."[254] The Order has been vigorously defended by Reagan administration officials, who note that, because it explicitly applies only to the extent permitted by law, it cannot be legally defective.[255] The evidence indicates, however, that OMB sometimes goes beyond the terms of both the Executive Order and the enabling statute in reviewing a rule.

For example, the Order applies only to "regulations" or "rules" defined essentially as in the APA definition of "rule."[256] Nonetheless, OMB often reviews documents which appear to fall outside of this definition—including guidance documents, interpretive statements, policy statements,[257] agency progress reports,[258] and even the settlement agreement in *NRDC v. EPA*[259]—for conformity with presidential policies. The legal basis for such review, given the definition of "rule" provided in the Executive Order, is tenuous.

Perhaps more unsettling is OMB's refusal to waive its review of rules which are to be strictly health based according to applicable statutes. For example, former EPA Chief of Staff Daniel recently testified before Congress that in the case of certain EPA rules required to be based solely upon health considerations, OMB was "trying to shape the standard and kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute."[260] While admitting that some rules such as EPA's NAAQS and the FDA-administered Delaney Amendment ban on carcinogenic food additives do not permit economic considerations, OMB has publicly stated that it reviews such rules.[261] The legal basis for OMB review, where economic considerations and technical feasibility of compliance with the rules are irrelevant, is here again not clear.[262]

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[254] *E.g.*, E.O. 12,291, *supra* note 1, §§ 2, 3.

[255] *See, e.g.*, Gray, *Presidential Involvement in Informal Rulemaking*, 56 Tul. L. Rev. 863 (1982); *cf.* Rep. Frank Horton, Executive Order 12291 and the Conflict Between the Legislative and Executive Branches of Government, *reprinted in Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 103, 116-17.

[256] *Compare* E.O. 12,291, *supra* note 1, § 1(a), *with* Administrative Procedure Act, 5 U.S.C. § 551(4) (1982).

[257] Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

[258] *See, e.g.*, N.Y. Times, Oct. 2, 1984, at A28, cols. 4-6 (EPA report titled "Environmental Progress and Challenges: An EPA Perspective," according to EPA sources cited in the *Times*, "might just as easily be called 'an OMB Perspective'" due to heavy editorial revisions of the report by OMB prior to its publication and distribution to Congress and the public).

[259] OMB reviewed this common issues settlement for nearly a month. *See OMB Worksheet*, *supra* note 216, at 3162.

[260] *Daniel Testimony*, *supra* note 46, at 81; *see* NAAQS case study, *infra* notes 371-80

Furthermore, OMB apparently does not feel constrained by the Executive Order explicitly exempting from review any regulation whose consideration by OMB "would conflict with deadlines imposed by statute."[263] For example, it has held several EPA New Source Performance Standards (NSPS's) for more than a year, well beyond the statutory deadline for promulgation.[264] It recently was reported that OMB, even more boldly, "is putting pressure on EPA to significantly weaken a draft rule proposing new truck standards for particulate and nitrogen oxide emissions just days before a district court deadline for action on the rulemaking."[265] The applicable court order had clearly stated that "OMB review is not only unnecessary, but in contravention to applicable law."[266]

Although a cost-benefit analysis consists of weighing costs against benefits, critics have charged that OMB fails to consider rules' benefits. OMB's response to a congressional committee questionnaire does little to rebut this allegation.[267] While the Executive

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and accompanying text.

[261] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 16), *reprinted in Hearings, supra* note 83, at 981-82 ("Even where economic considerations are entirely precluded as a basis for a rule, an assessment of the economic impacts can be extremely valuable. . . .In situations where an agency is precluded by statute from basing a decision on benefit-cost analysis, OMB reviews the regulation with that constraint in mind.").

[262] *See id.* OMB simply asserts: "[T]he results may be useful later when changes in the authorizing statute are being considered."

This shows a failure to understand the reason for prohibiting economic considerations, namely, that the regulation secures benefits not easily quantified, and therefore prone to deemphasis in a cost-benefit calculation.

[263] E.O. 12,291, *supra* note 1, § 8(a)(2).

[264] *See* NSPS case study, *infra* text accompanying notes 350-70; *accord Daniel Testimony, supra* note 46, at 82-83 (noting that several NSPS's were delayed "interminably" beyond the August 1982 deadline).

[265] *OMB Raises Big Concerns With Heavy-Duty Truck Rule as Court Deadline Nears*, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 12, 1984). The rule ultimately was released by OMB before the deadline. *See EPA Last Week Proposed Particulate and Nitrogen Oxides Standards for Trucks*, Inside EPA (Inside Wash. Pubs.) 9 (Oct. 19, 1984); the rule was published at 49 Fed. Reg. 40,258 (1984).

[266] Natural Resources Defense Council, Inc. v. Ruckelshaus, No. 84-758, at 8-9 (D.D.C. filed Sept. 14, 1984).

[267] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 3), *reprinted in Hearings, supra* note 83, at 974 ("We do not, however, require agencies to calcu-

Order establishes cost-benefit analysis and net benefit maximization as the criteria by which OMB should judge rules, OMB officials admit that their regulatory review can be simply a means of assuring that the rules comply with the "cosmic presidential policies," as OMB staff see them.[268] As one key OMB official notes, "debate of the merits of the economic analysis [of EPA] doesn't help" resolve the real issues; where OMB has budgetary, philosophical, or political problems with a rule, the regulatory analysis is used as "a key" in holding up or changing the EPA action.[269]

OMB staff report that "common sense is an important constituent" of the Office's review,[270] and that the Office dislikes "command and control" regulations, favoring instead "market incentive" approaches.[271] And, as might be expected, a pivotal review criterion is the political impact of the rule; OMB management always has its "political antennae" out.[272] OMB's "political antennae" often pick up strong signals from industry transmitters.[273] Similarly, interagency political disputes are often waged at OMB; for example, if an EPA standard is projected to put the Department of Energy (DOE) to expense, OMB's budget examiners may weigh in for DOE, attempting to minimize the cost of the EPA rule.[274]

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late. . .'what the benefits are that were lost or never gained due to the Executive Order.' Such calculations would be very difficult, speculative, and of little value to either our process or agency regulatory decision-making.") (quoting from Questionnaire). When an agency formally prepares an estimate of a rule's benefits, OMB review of the rule would include consideration of that estimate. *See generally* GAO Report on Cost-Benefit Analysis, *supra* note 248.

[268] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *accord* Interview with Jim Tozzi, former OMB, OIRA Deputy Adm'r, in Washington, D.C. (June 14, 1983).

[269] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983); *accord* *Daniel Testimony*, *supra* note 46, at 6 ("[T]here was immense pressure brought by OMB on the agency to change [a rule] and it was *purely philosophical*, because there was no cost analyses [sic], cost-effectiveness studies or anything else that I think would have borne out any basis for changing that part of the reg.") (emphasis added).

[270] Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983); *accord* J. Lash, *supra* note 204, at 24 (former OIRA Deputy Adm'r Tozzi "says he could 'tell in about four minutes if a rule made sense' ").

[271] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983). Despite OMB's claimed push for market-based or alternative regulatory approaches, GAO investigators found that "OMB appears to make only a modest effort to encourage the use of other regulatory techniques as an alternative to simply establishing less restrictive standards." GAO Report on 12,291, *supra* note 24, at 4.

[272] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[273] *See infra* text accompanying notes 282-95.

b. Waivers & Exemptions from E.O. 12,291: OMB Oversight is Not Always a Cost-Benefit Review

A close look at OMB's use of exemptions and waivers demonstrates that if an EPA action *relaxes* a standard, there is likely to be no effort on OMB's part to assess the costs and benefits of the action. In an OMB annual report on progress under E.O. 12,291, OMB openly admitted that it exempts from review rules "which relax or defer regulatory requirements, or which delegate regulatory authority to the states; such exemptions were granted only for nonmajor and noncontroversial regulations."[375] When asked if a rule that is being relaxed to reduce compliance costs would have to go through "the time consuming RIA procedure," OIRA's former Administrator James Miller responded: "[I]f OMB . . . were convinced on the basis of evidence, *however sparse*, that such a reduction [in compliance costs] would occur, a waiver would be granted immediately."[376]

A look at OMB oversight of major rule relaxations bears this out. For example, while OMB engaged in a protracted argument with EPA over whether an RIA is required for the possible tightening of the particulate matter National Ambient Air Quality Standard (NAAQS),[377] it cleared EPA's revocation of the hydrocarbon NAAQS in two days with no formal RIA.[378] When a series of noise pollution rule relaxations and suspensions reached OMB, they

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nying notes 326-49; *see also Daniel Testimony*, *supra* note 46, at 5 (citing OMB's adoption *in toto* of DOE position on EPA rule affecting DOE energy facilities).

[375] OMB, Executive Order 12291 on Federal Regulation: Progress during 1981, at 36 (Apr. 1982) [hereinafter cited as OMB 1981 Report on 12,291]. The 1982 OMB annual report on E.O. 12,291, *supra* note 187, at 30-31, dropped this statement, but lists several categories of deregulation among those EPA actions which are automatically exempt from review: (1) "pesticide tolerances [and] tolerance *exemptions*. . .except those which make an existing tolerance *more stringent*"; (2) "carbon monoxide and nitrogen oxide *waivers*. . .and *deletions* from the [NSPS] source categories list"; (3) "hazardous waste *delisting* petitions"; (4) "*deletions* from the 307(a) list of toxic pollutants; and *suspensions* of Toxic Testing Requirements"; and, (5) "TSCA Section 5 test marketing *exemptions*." (emphasis added).

[376] *Deregulation H.Q.*., *supra* note 214, at 17 (emphasis added).

[377] *See* NAAQS case study, *infra* text accompanying notes 371-80.

[378] The rule was logged at OMB on March 9, 1982, and found consistent on March 11. *OMB Worksheet*, *supra* note 216, at 3193. Final revocation of the hydrocarbon NAAQS was published at 48 Fed. Reg. 628 (1983). EPA explained that the revocation "is *not* major [rulemaking subject to the RIA requirement] because it involves revocation of a standard or guide, which in itself has required only limited regulatory costs. Revocation will result in no increased regulatory costs." *Id.* at 628 (original emphasis). The Agency, it seems, here adopts the OMB view that *relaxations* are not subject to the RIA and cost-benefit provisions of E.O. 12,291.

were, again, cleared in two days.[379]

This perfunctory review of rule relaxations seems to indicate that if a rule is to be relaxed, OMB often is not concerned with whether the net societal benefits are greater with the rule intact or with the relaxation.[380] Research has not uncovered a single instance of OMB's insistence that EPA maximize net benefits by increasing health or environmental protection.

C. *Secrecy & Ex Parte Contacts at OMB*

OMB long has been criticized for the secrecy with which it operates. The Office does not record or summarize for the public its meetings with outside parties or agency personnel. Secret OMB-agency arm-twisting sessions may be especially troublesome if OMB is passing on information or arguments as a conduit for outside parties, a concern which OMB steadfastly asserts is apocryphal.[381]

1. *OMB-Industry Contacts: Extensive, Secret, Unrecorded*

OMB is a new focus of power in the federal bureaucracy to which many sophisticated attorneys turn if the rulemaking agency is likely to be unreceptive. Joan Bernstein, former EPA General Counsel, has gone so far as to suggest that an attorney representing a client on regulatory matters borders on incompetence if he or she does not use OMB.[282]

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[379] *Id.* at 3153.

[380] OMB now vigorously denies that it fails to review deregulatory measures. *See* OMB Response to House Questionnaire, *supra* note 83 (Question 2), *reprinted in Hearings*, *supra* note 83, at 971-72 ("Virtually all of the Reagan Administration's 'relaxations' of pre-existing rules have been reviewed in detail by OMB before issuance."). Even taken as true, however, this response passes over the nub of the problem: does OMB fully consider the *costs* of regulations being relaxed, or *benefits* of possible increases in a rule's stringency? The Supreme Court's recent decision in the motor vehicles passive restraints case, Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mutual Auto. Ins. Co., 103 S. Ct. 2856 (1983), reversed a National Highway Traffic Safety Administration rule rescission targetted by the Task Force and OMB. The Court demanded that the Administration consider deregulatory measures potentially more cost-beneficial than a total rescission. *See also supra* note 267 (OMB states that agencies are not asked to calculate benefits foregone due to relaxation of regulations).

[381] *See, e.g.*, Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale, OMB: "As for us being a conduit for industry views I think that's a distortion. It's entirely proper that we receive industry's views, but there are strict procedures [for that]. . . .Only the very top people [at OMB] can have any conversations with industry."); *see also* N.Y. Times, Sept. 28, 1983, at A1, col. 1 ("Mr. DeMuth said the office 'never did anything improper' and never acted as a 'back channel' as some have charged, for industry to get its way.").

OMB encourages such input.[283] The Office sometimes actively solicits industry comments on specific rules. For example, former EPA Chief of Staff Daniel testified that he received industry comments on EPA rules after OMB had sent the rules to industry representatives, while the rules were under review at OMB, but well before their release to the public.[284] OMB admits that on occasion the Office does go to industry to ask for comments on EPA rules.[285]

As a result of this encouragement, OMB management spends much of its time meeting with industry representatives.[286] Written comments from industry come "pouring into" OMB offices;[287] as one staffer said, "what OMB sees is reflective of the lobbying power" of the parties involved in rulemaking.[288] OMB openly states that its officials "have met with countless numbers of groups," but will not say with whom these officials have met or what rules have been discussed, assertedly because OMB does "not compile records of meetings or of the subjects discussed."[289]

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[282] *Hearings on Role of OMB, supra* note 31, at 28 (testimony of Joan Bernstein). Similarly, an article in the National Law Journal suggested that since OMB has gained so much power under the Executive Order,

> the practitioner should make every effort, where appropriate, to communicate with the director [of OMB] to attempt to influence his views on a proposed rule in the direction of the client's preference. In the absence of any ground rules, the possible approaches are limited only to the extent of the practitioner's ingenuity. . . .

Quoted in, Hearings on OMB Control of OSHA Rulemaking, supra note 204, at 12.

[283] For example, Task Force Counsel C. Boyden Gray advised his industry listeners:

> [I]f you go to the agency first, don't be too pessimistic if they can't solve the problem there. If they don't, that is what the Task Force is for. We had an example of that not too long ago. . . .[L]awyers representing the individual companies and trade associations. . .showed up and I asked if they had a problem. They said they did and we made a couple of phone calls and straightened it out, alerted the top people at the agency that there was a little hanky panky going on in the bottom of the agency, and it was cleared up very rapidly. So the system does work if you use us as sort of an appeal. We can act as a double-check on the agency that you might encounter problems with.

C. Boyden Gray, Remarks at Transcription of Hall of Flags Reg Reform Briefing (April 10, 1980), *reprinted in Hearings on Role of OMB, supra* note 31, at 92.

OIRA's former Administrator Miller suggested that there are several ways to solicit OMB action on behalf of a business: "Those who are interested will try many ways of making contact. The best way, of course, is to submit written material. Another is to arrange a personal visit. A third is to sit in front of the office door—which I've had some people do." *Deregulation H.Q., supra* note 214, at 19.

[284] Daniel explained that he later determined that the industry representative who had contacted him actually had intended to comment to OMB on the draft EPA rule, but had inadvertantly contacted Daniel at EPA with his comments. *Daniel Testimony, supra* note 46, at 80.

[285] According to OIRA Administrator DeMuth, OMB's reputation is that they "are as tight as a drum." DeMuth admitted, "I can't say we have never gotten any input from industry. . . . There were a few cases in the hundreds of EPA rules coming over here from EPA where we couldn't get an answer from EPA or anybody here. So we got them from industry. There is no secret about it." N.Y. Times, Sept. 28, 1983, at A22, col. 3.

[286] Interview with OMB, OIRA Official "B" in Washington, D.C. (May 3, 1983).

[287] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

The Office insists that it meets with interested persons on all sides of regulatory issues.[290] Evidence indicates, however, that industry interests spend a disproportionate amount of time meeting with and passing documents on to OMB, as compared with public interest groups or consumers.[291]

OMB refuses, in general, to record or summarize these meetings with outside parties.[292] As a result, the only available public record of these meetings is that elicited during congressional hearings into OMB's role in rulemaking. In one hearing, OMB provided an admittedly incomplete list of OMB-outside party contacts during a two month period early in the Reagan administration. The list revealed that at least thirty-six such meetings were held, all but three with industry representatives.[293]

This extensive OMB-industry communication has led several critics, including top-level EPA officials, to charge that the Office acts as a "conduit" of information and arguments from industry to EPA.[294] The evidence seems to amply document this charge.[295]

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[288] *Id.*

[289] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 5), *reprinted in Hearings, supra* note 83, at 985-86.

[290] *Id.*

[291] For example, the author submitted to OMB an FOIA request for all documents sent by outside parties to OMB discussing roughly a dozen EPA rules under OMB review. Of the scores of documents produced, the author counted three from environmental, public health and consumer groups. The overwhelming majority of the documents were from industry representatives; many of these adverted to telephone calls and meetings between OMB and industry, some occurring after the public comment period. OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).

The lack of public interest group input into OMB decisionmaking may be due in part to OMB's unwillingness to actively solicit these groups' views on EPA rules, and, probably in greater part, to the reluctance of public interest groups to allocate their scarce resources to what they view as a futile exercise.

[292] OMB Response to House Questionnaire, *supra* note 83 (Questions 2, 6), *reprinted in Hearings, supra* note 83, at 985, 986.

[293] *Hearings on Role of OMB, supra* note 31, at 58-61.

[294] Former EPA Administrator Costle, who served under President Carter, warns that under the Executive Order, industry representatives are given an "extra inning" in which to attack EPA rules. Interview with former EPA Administrator Douglas Costle in Washington, D.C. (August 17, 1983).

Former EPA Chief of Staff Daniel, a veteran of the Gorsuch-Burford EPA, concurs, stating that OMB frequently intervenes in EPA rulemaking on behalf of industry. *See Daniel*

2. *OMB-EPA Contacts*

OMB's criticisms of EPA rules are rarely written, but instead rendered in unannounced meetings between OMB and agency staff, or by telephone.[296] These oral communications, almost without exception, are neither summarized in writing nor publicly logged for the EPA docket by either agency.[297]

One OMB official explains that the Office doesn't like to "leave fingerprints."[298] The Office is willing to accept a requirement that

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Testimony, *supra* note 46, at 82:

> *Mr. Gore.* . . . [S]o the inescapable conclusion is that [OMB] just sat over there and acted as a back-door channel to let the corporations affected hotwire the regulatory process and get the result that they wanted. . . .
>
> *Mr. Daniel.* I think you have correctly characterized it, yes.

See also id. at 5.

[295] *See infra* text accompanying notes 305-11.

[296] *Daniel Testimony*, *supra* note 46, at 82; *accord* Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983).

[297] Interview with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983); Interview with Dan Egan, EPA, Radiation Programs Office, in Arlington, Va. (May 24, 1983); Interview with Allan Jennings, EPA, Office of Standards and Regulations, in Washington, D.C. (March 30, 1983); *see also* Section III.D., Case Studies, for a discussion of docketing practices by EPA in specific rulemakings. Both OMB and EPA report that although many rules have been modified as a result of OMB input, there is no comprehensive or accessible information on these changes. *See* Office of Management and Budget Response, Questionnaire from Congressman Sam Hall, April 25, 1983 (response to Question 1.a.3.), *reprinted in Hearings*, *supra* note 83, at 2642; EPA Response to House Questionnaire, *supra* note 242 (Question 5(a)(3)), *reprinted in Hearings*, *supra* note 83, at 1560.

[298] Wash. Post, July 10, 1981, at A21, col. 2 (quoting Jim Tozzi, OMB, OIRA Deputy Adm'r).

OMB officials offer several reasons for this secrecy. First, they argue that because of their extremely heavy workload and because there is only a handful of OMB staff keeping tabs on all of EPA, it is essential that they not waste their time writing down criticisms of EPA rules, or logging and summarizing EPA-OMB meetings. Interviews with OMB, OIRA Officials "B" and "C" in Washington, D.C. (May 3, 1983).

This is unconvincing. If OMB's workload is onerous, this is largely self-inflicted, for it has not requested a significant increase in staff. Agency staff are also very busy, yet they typically are required to log and summarize meetings. Furthermore, the workload problem at OMB certainly cannot be the reason why *EPA* officials do not record and summarize OMB-EPA meetings.

A second reason given by OMB for not recording its criticisms is that by conducting its business orally, it can change its mind at a later date. Interview with OMB, OIRA Official "C" in Washington, D.C. (May 3, 1983). This permits late input by Budget Examiners, White House staff, or OMB management without providing EPA a piece of paper with which to protect itself.

The last reason OMB offers is, "If everything is to be shared [with the public], then advice is not candid and to the point and straightforward." *Hearings on Role of OMB*, *supra* note 31, at 57 (testimony of James Miller, III, former OIRA Adm'r). This assertion is the refuge of those desiring governmental secrecy. One wonders why OMB would fear to be candid with communications intended solely to increase decisionmaking rationality. Regard-its *written* comments on agency rules be publicly docketed, provided that its regulatory review powers are statutorily codified;[299] it has, however, vehemently opposed any effort to require it (or an agency) to log, summarize or docket the Office's oral contacts with the agency or outside parties.[300]

On occasion, OMB does record its comments on EPA rules. In many of these cases, however, the comments are not placed in EPA's public rulemaking docket.[301] Further, OMB's oral comments influencing an EPA rule often are not discussed in the rule's preamble; neither are they consistently summarized for the docket—despite the fact that often the rule's substance appears to have been influenced by OMB input.[302]

EPA generally does not place in the docket copies of the draft or proposed rule which is sent to OMB for review.[303] Little of OMB review is reduced to writing. Overall, even less of OMB's input into

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less, the public's right to meaningful participation in EPA rulemaking must be balanced against OMB's need for candor. If a rule's substance is affected by OMB pressure, that influence should be reflected on the public record.

[299] *See Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 312, 339; OMB Response to House Questionnaire, *supra* note 83 (Question 9), *reprinted in Hearings*, *supra* note 83, at 977.

[300] *See, e.g.*, OMB Response to House Questionnaire, *supra* note 83 (Question 10), *reprinted in Hearings*, *supra* note 83, at 977-78 (logging or docketing requirement "is totally unworkable" and "would certainly lead to a bonanza of new work for administrative lawyers").

OMB disfavors any agency initiative to divulge the full extent of OMB influence on rulemaking. When asked if it would object to an agency publicly docketing summaries of OMB-agency meetings, for example, OMB obliquely responded that the Office "would not favor a policy or practice by an agency which sought to, or acted to inhibit communications concerning informal rulemaking between an agency and the President or, in this instance, his agent, OMB." *Id.* (Question 11), *reprinted in Hearings*, *supra* note 83, at 979.

[301] *See, e.g.*, Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Joseph Cannon, EPA Assoc. Adm'r for Policy & Resource Mgmt. (July 9, 1982) (returning seven draft NSPS's to EPA; absent from four of seven dockets: A-79-47 (metal furniture surface coating), A-80-05 (metal coils), A-80-06 (large appliances), A-79-50 (rotogravure printing of publications) (dockets located in EPA Docket Room, Washington, D.C.)); Letter from Jim J. Tozzi, OMB, OIRA Deputy Adm'r, to Kathleen Bennett, EPA Ass't Adm'r for Air, Noise & Radiation (Nov. 18, 1982) (arguing against beverage can surface coating NSPS; not docketed for nine months, until after final rule promulgated). (Letters on file with author.)

[302] Of the extensive OMB-EPA debate over the High Level Radioactive Waste Disposal rule, and over several NSPS's, none is summarized for the docket or fully discussed in the rules' preambles. *See* High Level Radioactive Waste Disposal rule case study, *infra* text accompanying notes 326-49; NSPS case study, *infra* text accompanying notes 350-70.

[303] For example, drafts of NSPS's for beverage can surface coating, large appliance surface coating and rotogravure printing of publications sent to OMB for 12,291 review were not placed in the docket. *See* EPA Dockets A-80-04, A-80-06, A-79-50, respectively (located in EPA Docket Room, Washington, D.C.).

EPA rulemaking is ever publicly docketed.[304] This makes it almost impossible for the public or reviewing court to know the extent of OMB involvement in any given rulemaking, or in EPA rulemaking as a whole.

3. OMB as a Conduit from Industry to EPA

Former EPA Chief of Staff Daniel has charged that OMB frequently represents industry arguments to EPA as its own.[305] This would not be surprising in light of OMB's active encouragement of industry contacts and its proclivity for undocumented communications with EPA.

OMB vigorously denies that it acts as a "conduit" for industry;[306] nonetheless, the case studies below,[307] Daniel's testimony, and the EPA iron and steel industry effluent guideline rulemaking[308] indicate that OMB does indeed act as a conduit for the views and data of both industry and other federal agencies. A key OMB

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[304] A memorandum from former EPA Administrator Ruckelshaus to EPA employees raised the prospect that EPA might begin to more fully document OMB comments. W. Ruckelshaus, EPA Adm'r, Contacts with Persons Outside the Agency (May 19, 1983) (memorandum to all EPA employees), *reprinted in Hearings*, *supra* note 83, at 1648 [hereinafter cited as Ruckelshaus memorandum]. The memorandum can be read as a change in existing policy, stating in part:

> [A]ll written comments received from *persons outside the Agency* (whether during or after the comment period) are [to be] entered in the rulemaking docket, and. . .a memorandum summarizing any significant new factual information or argument likely to affect the final decision received during a meeting or other conversations is [to be] placed in the rulemaking docket.

Id. at 2 (emphasis added).

The broad phrase "persons outside the Agency" could include OMB staff; however, EPA's Office of General Counsel has stated that no change in EPA's policy regarding docketing of OMB comments is intended. Interviews with EPA, Office of General Counsel (OGC) Officials "G" and "H" in Washington, D.C. (June 8, 1983). One key attorney stated that "the policy will be determined in the first case" to be adjudicated, rather than by EPA staff counsel. Interview with EPA, OGC Official "G" in Washington, D.C. (July 1, 1983). In other words, admitted the attorney, EPA staff are given little direction as to docketing of OMB contacts. *Id.*

[305] *Daniel Testimony, supra* note 46, at 5, 82.

[306] *See supra* note 281.

[307] *See infra* text accompanying notes 325-80. As another example, OMB's position in the gasoline "lead phasedown" debate was reached after OMB secretly met with affected industries at least fourteen times and after OMB had received scores of documents from these industries, some of which are not in the EPA docket. Eight of these meetings were revealed when Congressman Moffett demanded a list of all meetings between Task Force or OMB personnel and interested parties to the lead phasedown. Letter from Christopher DeMuth, OMB, OIRA Adm'r, to Hon. Toby Moffett (Sept. 8, 1982). The Vice President's Office revealed that Task Force staff had met twice with oil industry interests, in June and July 1982, in response to industry demand. Letter from C. Boyden Gray, Counsel to the Vice President, to Hon. Toby Moffett (Aug. 20, 1982); Memorandum from Jane Kelly, Office of the Vice President, to Christopher DeMuth (Aug. 27, 1982) (attached to DeMuth letter to Moffett). Finally, a meeting of the Lead Industries Association with DeMuth took place on September 17, 1982, and a meeting of attorneys representing petroleum blenders with OMB,

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OIRA Regulatory Analyst Brian Mannix took place on October 7, 1982, according to letters revealed to the author in response to his FOIA request (June 13, 1983). (All materials on file with author.)

The Task Force openly stated that review of the gasoline lead regulations resulted from industry pressure. *See* Remarks of Vice President George Bush at the Presidential Task Force on Regulatory Relief Briefing, Washington, D.C., Attachment: Existing Regulations to be Reviewed 3 (August 12, 1981) (copy on file with author). The shifts in OMB's position throughout this rulemaking, in response to industry pressure, are well detailed in trade press such as Inside EPA (Inside Wash. Pubs.) between December 1981 and October 1982.

[308] Late in the Carter administration EPA proposed effluent guidelines, under the Clean Water Act, for iron and steel plants. *See* Proposed Rules, 46 Fed. Reg. 1858 (1981). These stringent proposed rules created an outcry in the iron and steel industry, which heavily lobbied both EPA and OMB for changes in the rules. *See* EPA docket for Iron & Steel Effluent Guidelines (two hundred and four volumes, including massive industry critiques) (located in EPA Library, Washington, D.C.). OMB showed the author a sample of the documents it received on the EPA proposal. Every document came from industry; the file was two inches thick and filled with data, some of which do not appear to be in the EPA docket.

OMB became involved in the final rulemaking prior to EPA's internal review. Interview with EPA, Effluent Guidelines Division (EGD) Official "M" in Washington, D.C. (June 9, 1983). For example, OMB urged EPA to relax the "central treatment" portion of the rules. Interview with EPA, EGD Official "N" in Washington, D.C. (May 24, 1983). During its review, OMB received a thick stack of industry comments and documents, including extensive economic analyses, criticizing EPA's "over-optimistic" economic data. *See, e.g.*, Central Treatment: Addendum (March 11, 1982) (unsigned memo in OMB files for outside comments, recommending that OMB force EPA to complete an RIA prior to promulgation); Effluent Limitation Guidelines (ELG's): Iron and Steel Industry Subcategory (undated, unsigned memo, four pages in length, in OMB files for outside comments, encouraging OMB to "exercise oversight of EPA's finalizing of these regulations to ensure that they will be 'least cost' consistent with" E.O. 12,291); EPA's Proposed Effluent Limitations Guidelines for "Best Available Technology" for the Iron and Steel Industry (*Federal Register*, 1/7/81) (unsigned, undated memo in OMB files for outside comments). This strongly suggests that OMB was acting as a conduit and amplifier of industry comments, as John Daniel has maintained. *See* testimony cited *supra* note 305.

As a court-ordered deadline approached, several meetings took place, at which industry representatives told OMB that certain "new" data they had gathered showed that EPA's cost estimates should have been in the $1.7 billion per year neighborhood, rather than $350-400 million. Interview with EPA, EGD Official "M" in Washington, D.C. (June 9, 1983). The OMB public files include letters from iron and steel industry representatives adverting to industry-OMB telephone conversations and meetings at which the rules were discussed. Though they were submitted well after the close of the comment period, OMB told EPA to consider the data before promulgating the rules. Interview with EPA, EGD Official "N" in Washington, D.C. (June 9, 1983).

Ultimately, EPA Administrator Gorsuch told OMB that EPA would meet the court deadline with or without OMB approval. *Id.* Nonetheless, the cost to industry under the final effluent guidelines was substantially less than that of the proposed rules. *Id.*

For a review of the settlement agreement negotiations that ultimately ended the steel effluent guidelines dispute, see Miller, *Steel Industry Effluent Limitations: Success At the Negotiating Table*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,094 (1983).

official privately admitted that "on occasion, OMB has played the heavy for industry," but also asserted that OMB's intervention on industry's part generally is required only when EPA staff keep high-level policymakers unaware of certain information.[309]

The evidence indicates that OMB passes industry arguments and data to EPA without indicating the source of the comments, amplifying industry's voice at EPA.[310] OMB engages in these contacts after the close of the comment period as well.[311]

4. *OMB Actions to Quell Criticism of Secret Industry Lobbying*

OMB management is fully aware of the criticism of its meetings with outside parties. The Office asserts in response: "[T]he very purpose of . . . Executive Order 12291 is to make regulatory decisions more transparent and accessible,"[312] and they "emphatically disagree that [OMB's] is a 'secret' role" in the rulemaking process.[313]

The Office has taken several actions aimed at blunting the charges of behind-closed-doors decisionmaking. First, OMB Director David Stockman issued guidelines stating: "OMB will regularly advise those members of the public with whom they communicate that relevant factual materials submitted to them should also be sent to the agency for inclusion in the rulemaking record."[314] OMB has no system to monitor whether its recommendations are heeded.[315] The Stockman guidelines do not call for any docketing or recording of oral contacts, or of written legal or policy arguments. Only "factual materials" are covered, leaving a wide exception which allows—perhaps encourages—OMB staff to transmit the arguments they hear from outsiders to agencies.

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[309] Interview with OMB, OIRA Official "A" in Washington, D.C. (May 17, 1983).

[310] *See, e.g.*, discussion of OMB influence on EPA's effluent guidelines for the iron and steel industry, *supra* note 308, and John Daniel's testimony thereon, *Daniel Testimony*, supra note 46, at 5; *see also* NSPS case study, *infra* text accompanying notes 350-70.

[311] For example, much of the OMB-industry contact during both the iron and steel effluent guideline review, *see supra* note 308, and the beverage can surface coating NSPS review, *see infra* text accompanying notes 359-65, took place after the close of the comment period.

[312] Statement of Christopher DeMuth, Administrator for Information and Regulatory Affairs, OMB, Before the Subcommittee on Administrative Law & Governmental Relations of the House Judiciary Committee, on H.R. 2327, the Regulatory Reform Act of 1983 (July 28, 1983), *reprinted in Hearings*, *supra* note 83, at 905, 922.

[313] OMB Response to House Questionnaire, *supra* note 83 (Question 11), *reprinted in Hearings*, *supra* note 83, at 988-89.

[314] David A. Stockman, Director, OMB, Certain Communications Pursuant to Executive Order 12291, 'Federal Regulation' (memorandum M-81-9) (June 11, 1981), *reprinted in Hearings*, *supra* note 83, at 2811 [hereinafter cited as Stockman Guidelines].

[315] GAO Report on 12,291, *supra* note 24, at 53-54. Davis, *supra* note 2, criticizes the Guidelines as inadequate to protect the integrity of informal rulemaking

The Office also cites a second action it has taken to moderate industry influence: OMB spokesmen assert that "only the very top people [at OMB] can have any conversations with industry."[316] OMB cites memoranda to the effect that lower-level staff cannot meet with industry representatives to discuss rules.[317] This prohibition, however, has gone unobserved with the full knowledge of OMB management,[318] and does not inhibit OMB staff from discussing "paperwork" requirements of rules—requirements which often are so integrally linked with the rules' substance as to be inseparable.[319] In addition, OMB staff are "encouraged . . . to review any *written* material" submitted by outside parties.[320] Finally, the loose strictures on industry contacts are wholly inapplicable to well over a dozen OMB managers,[331] including those who sign off on all OMB rule reviews.[332]

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[316] Wash. Post, Sept. 28, 1983, at A8, col. 4 (quoting Edwin L. Dale).

[317] *See, e.g.*, Jim J. Tozzi, OMB, OIRA Deputy Adm'r, Memorandum to Desk Officers: Contacts with Non-Federal Employees (undated), *reprinted in Hearings on Role of OMB*, *supra* note 31, at 195 [hereinafter cited as Tozzi memo to Desk Officers].

[318] For example, the Desk Officer reviewing the NSPS for the synthetic fiber industry met in February 1983 to discuss the rule with representatives of the Chemical Manufacturers' Association and the Man-Made Fibers Products Association. Follow-up letter from H. Adams, Jr., Man-Made Fiber Producers Ass'n, to Jim Tozzi and Don Arbuckle, OMB, OIRA (Feb. 18, 1983) (copy on file with author).

When asked by a congressional subcommittee why a Desk Officer at OMB had been allowed to meet with industry to discuss a rule, OMB responded that the meeting "concerned only the reporting and record-keeping requirements proposed in EPA's rule which OMB was required to review under the Paperwork Reduction Act." OMB Response to House Questionnaire, *supra* note 83 (Question 7), *reprinted in Hearings*, *supra* note 83, at 986-87. According to EPA's Federal Register notice, however, the NSPS for Synthetic Fiber Production Facilities involved no reporting and recordkeeping requirements for OMB to review under the Paperwork Reduction Act. *See* Standards of Performance for New Stationary Sources; Synthetic Fiber Production Facilities: Proposed Rule and Notice of Public Hearing, 47 Fed. Reg. 52,932, 52,943 (1982) ("This rulemaking does not involve a 'collection of information' as defined in the 1980 [Paperwork Reduction] Act. Therefore, the Provisions of the Paperwork Reduction Act. . .do not apply to this rulemaking.").

[319] OMB recently has initiated a policy whereby Desk Officers must notify their superiors of any meetings they will have with outsiders regarding paperwork reviews, since a discussion of paperwork "could blend easily into a discussion of the substance of the regulation which contains the information collection." Gail Coad, OIRA Regulatory Policy Branch Chief, Contacts With the Public Involving Proposed Collection of Information (April 19, 1983 memorandum to Reg. Policy Desk Officers), *reprinted in Hearings*, *supra* note 83, at 2814. No *prohibition* of staff-level contacts with industry regarding paperwork is established, however, nor is the policy changed that Desk Officers may freely telephone outsiders regarding paperwork reviews. *Id.*

[320] Tozzi memo to Desk Officers, *supra* note 317 (emphasis added). The policy's inefficacy in limiting the influence of outside parties on OMB is manifest; the OIRA Administrator candidly admitted, in fact, that the policy's *raison d'etre* is primarily "a matter of protecting the staff from the deluge of phone calls that come in when you are trying to make a [illegible] judgment on a controversial matter" rather than an attempt to actually limit

The Office asserts, in response to critics of its secrecy, that it has established a public docket which includes "all material sent to OMB from outside parties about regulations."[333] The author could locate no such comprehensive docket.[334]

D. Case Studies

In this section, three case studies illustrate OMB review of EPA rules under E.O. 12,291. In each case, the limited degree to which OMB's input into the rulemaking is reflected on the public record will give the reader an idea of how difficult it is to comprehend OMB's influence simply by relying on the rulemaking docket. Although the *Home Box Office v. FCC* court spoke in a slightly different context, its fear that secrecy might create "the possibility that there is here one administrative record for the public and this court and another for the [agency] and those in the know"[335] appears to be well founded.

1. High-Level Radioactive Waste Disposal Rule

The disposal of highly radioactive waste from nuclear power plants and nuclear weapons programs has become a key point of

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outside influence on OMB. *Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 381 (testimony of Christopher DeMuth).

[331] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 1), *reprinted in Hearings*, *supra* note 83, at 985 (enumerating those at OMB authorized to talk with outside parties interested in rulemaking, including staff as low as deputy associate directors, branch chiefs, a chief statistician, "and other senior staff as may be authorized on [a] case-by-case basis").

[332] *Id.* (noting that the OIRA administrator, deputy administrators and branch chiefs are authorized to meet with outsiders regarding rules).

[333] *See Hearings on OMB Control of OSHA Rulemaking*, *supra* note 204, at 309-10; *see also* OMB Response to House Questionnaire, *supra* note 83 (Question 8), *reprinted in Hearings*, *supra* note 83, at 987.

[334] When the author requested access to the docket, he first was told that no such docket existed; when the testimony was pointed out, he was shown a thin set of seven folders containing comments on as many EPA rules. Conversations with OIRA Adm'r DeMuth's Office, OIRA Deputy Adm'r Bedell's Office (June 9 & 10, 1983). Pursuant to the author's FOIA request for any materials OMB had received from outside parties regarding a number of EPA rules under review, the Office produced scores of documents, almost exclusively from industry representatives, none of which had been in the OMB "docket." OMB Response to Author's FOIA Request (June 13, 1983) (on file with author).

[335] 567 F.2d 9, 54 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

public debate.[326] The Nuclear Regulatory Commission (NRC) and the DOE ultimately will implement the high-level nuclear waste disposal program in the United States, while EPA is charged with promulgating environmental protection requirements for this program.[327] Some of these wastes will remain lethally radioactive for ten thousand years.[328]

After years of internal debate and redrafting, EPA sent its nineteenth draft of the proposed high-level radioactive waste disposal rule to OMB for review on December 24, 1981.[329] OMB sent the regulatory package to NRC and DOE, each of which objected to the proposal on several grounds. A major squabble ensued between the agencies over the precise jurisdiction of each in adopting and implementing the rules. OMB, as traditional arbiter of interagency jurisdictional disputes[330] and as E.O. 12,291 review authority, extended its review beyond the sixty-day period prescribed in the Executive Order and told EPA that it was required to get both DOE and NRC to sign off on the rule before OMB would even consider releasing it.[331]

Interagency negotiations ensued, leading to important changes in the rule. For example, EPA finally agreed to a significant relaxation of the definition of "accessible environment"; the EPA draft definition included earth and groundwater one mile from the disposal site or more, while the definition after interagency negotiations included only earth and groundwater "more than ten kilometers" from the site.[332]

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[326] *See, e.g.*, F. Shapiro, Radwaste: A Reporter's Investigation of a Growing Nuclear Menace (1981).

[327] *See* Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10,101-10,226 (1982); Environmental Standards for the Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes: Proposed Rule, 47 Fed. Reg. 58,196, 58,197 (1982) [hereinafter cited as High-Level Radwaste Rule].

[328] *See* EPA, Draft Environmental Impact Statement for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes (Dec. 1982) [hereinafter cited as EPA Radwaste DEIS]; *see also* High-Level Radwaste Rule, *supra* note 327, at 58, 199.

[329] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983); *accord Daniel Testimony*, *supra* note 46, at 82.

[330] The Office's wide acceptance as the forum at which interagency disputes are waged stems from a long history of OMB mediation of jurisdictional and policy debates within the executive branch.

[331] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

[332] *Id.* This change came largely at NRC's insistence. *Id.* A copy of the EPA draft rule sent to OMB (in author's files), when compared to the proposed rule as published in the Federal Register, confirms that this change, among others, occurred during OMB review

After several months of negotiations, and several more changes in the proposal, DOE and NRC finally agreed, in late summer or early fall, to sign on to the rules.[333] However, after nine months of delay OMB continued to have "philosophical" disagreements with the rule.

OMB staunchly opposed the proposed rule's so-called "assurance requirements" establishing qualitative criteria for choosing a site.[334] OMB also opposed EPA's plan to have the President announce the rules; some EPA staff assume that OMB feared it would be politically unwise to have the President make such a proregulatory announcement.[335] Further, OMB and DOE sought to relax a provision limiting reliance on "institutional controls" (such as guards) to one hundred years when calculating the site's theoretical safety. OMB argued for a period of reliance on such controls of several hundred years.[336]

At this point, the proposal had been held up for ten months; finally, in an October 1982 meeting of EPA Administrator Gorsuch, OIRA Administrator DeMuth, and others,[337] the EPA Administrator reportedly engaged in a "shouting match"[338] with OMB, ultimately threatening to send the rule out "whether or not OMB liked it."[339]

Interagency arguments at the staff and policy levels continued, including discussions among EPA's Administrator and Deputy Administrator, and OMB. Ultimately, resolution was reached; EPA agreed not to have the President announce the rules, to relax the institutional controls standards from one hundred years to "several hundred years," and to ask for public comment on the "assurance requirement" issue.[340] On December 29, 1982, over a year after

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See High-Level Radwaste Rule, *supra* note 327, at 58, 196. "Accessible environment" is that area beyond the containment site into which radioactive waste release is to be measured when determining containment requirements. *See* EPA Radwaste DEIS, *supra* note 328, at 112-14.

[333] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

[334] *Id.*

[335] *Id.* EPA had been planning to issue "Federal Radiation Protection Guidance," which must be approved by the President; OMB opposed this. *Id.*

[336] *Id.*

[337] *Id.*

[338] Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

[339] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

[340] *Id.*

EPA submitted the proposed rule for review, the revised proposed rule was issued.[341]

Throughout the debate, asserts one EPA official, OMB's Budget Examiners for DOE and NRC acted as "surrogates" for the agencies, for fear that the standards would impose excessive costs on their respective agencies.[342] EPA also received inquiries from industry representatives during the OMB review which revealed that OMB had provided industry with copies of the draft rule (which still had not been made public), and had asked for their comments.[343] According to EPA staff, OMB used the Executive Order as a "ruse" to disguise its political (the presidential announcement) and philosophical (the assurance requirements, the period of institutional controls) objections.[344] Indeed, OMB hardly mentioned the EPA Regulatory Impact Analysis (RIA).[345] The RIA showed that, to the extent they were quantifiable, the costs of disposal were largely insensitive to variations in the standards' stringency.[346] It required the personal intervention and continued vocal support of the EPA Administrator to keep OMB's review moving; even then EPA made important concessions.

OMB's input into this proposed rule is not mentioned in the public record, although many of NRC's and DOE's comments are docketed.[347] A note in the EPA docket titled "Briefings Held to Date for other Government Officials" fails to mention any of EPA's meetings with OMB.[348] According to EPA officials, none of the meetings were publicly announced or open.[349]

2. *New Source Performance Standards*

OMB has taken great interest in EPA New Source Performance Standards (NSPS's) for new and modified stationary air pollution sources, vetoing or bottling up many NSPS's sent to it for review. In fact, OMB has "returned" at least eleven NSPS's to EPA since mid-1981.[350] An EPA official summarized OMB review of NSPS's this way: "[A]lthough the [Clean Air] Act requires us to issue these rules, OMB doesn't like technology-based standards—they sometimes seem upset when we bring up the statute."[351]

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[341] High-Level Radwaste Rule, *supra* note 327.

[342] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

[343] *Daniel Testimony*, *supra* note 46, at 80.

[344] Interview with Official "K", EPA Radiation Programs, in Arlington, Va. (May 24, 1983).

[345] *Id.*

[346] *See* EPA, Draft Regulatory Impact Analysis for 40 CFR 191: Environmental Standards for Management and Disposal of Spent Nuclear Fuel, High-Level and Transuranic Radioactive Wastes 42-59 (Dec. 1982).

[347] *See* EPA Docket R-82-3 (located in EPA Docket Room, Washington, D.C.).

[348] *Id.*, Document II-E-1 (March 21, 1983).

[349] Interviews with Official "K", EPA Radiation Programs (May 24, 1983) and Official "L", EPA Radiation Programs (April 27, 1983) in Arlington, Va.

EPA delivered all eleven of these NSPS's well before the statutory promulgation deadline of August 7, 1982.[352] OMB held all of them well beyond that deadline; indeed, two NSPS's were held at least ten months past the date.[353] One rule, the stationary internal combustion NSPS, was vetoed twice during more than two years of OMB review.[354] Though the statutory deadline has passed, OMB has made clear its intention to continue to review NSPS's currently being developed well behind EPA's required schedule.[355] This OMB review is in direct conflict with the Executive Order.[356]

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[350] NSPS's vetoed include: (1) the NSPS for stationary internal combustion engines (vetoed twice), Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981) (first veto); Letter from Christopher DeMuth, OIRA Adm'r, to Joseph A. Cannon, EPA Assoc. Adm'r for Policy & Resource Mgmt. (Apr. 28, 1983) (second veto); (2) the volatile organic liquid storage vessel NSPS, *see* OMB 1981 Report on 12,291, *supra* note 275, at 16; (3) the glass manufacturing plant NSPS; (4) the flexible vinyl coating and printing operations NSPS; (5) the surface coating of metal furniture NSPS; (6) the metal coil surface coating NSPS; (7) the graphic arts industry rotogravure printing NSPS; (8) the surface coating for large appliances NSPS; (9) the beverage can surface coating NSPS; (10) the rubber tire manufacturing NSPS (vetoes of NSPS's (3)-(10) noted in OMB 1982 Report on 12,291, *supra* note 187, at 16); (11) the phosphate rock plant NSPS, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981). (All letters on file with author.)

[351] Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

[352] The Clean Air Act deadline is found at 42 U.S.C. § 7411(f)(1) (1982) (requiring that all of the NSPS's listed in 40 C.F.R. § 60.16 (1983) be promulgated by Aug. 7, 1982). This fact was noted on each copy viewed by the author of *Standard Form 83: Request for OMB Review (Under the Paperwork Reduction Act and Executive Order 12291)*, the form submitted by the agency to OMB with each of the NSPS packages (copies on file with author). EPA submitted the final internal combustion engine rule on June 29, 1981, the volatile organic liquid storage vessels rule on June 25, 1981, Letter from James Miller, OIRA Adm'r, to Anne Gorsuch, EPA Adm'r (Aug. 19, 1981), the glass manufacturing rule in August 1981, and all of the other NSPS's listed in *supra note* 350 (except the phosphate rock NSPS) in May 1982. OMB 1982 Report on 12,291, *supra* note 187, at 16; Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

[353] Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine and beverage can surface coating rules were held for a year past the deadline. Memorandum from Harvey Nozack, EPA Office of Air Quality Planning & Standards (OAQPS), to Sheldon Meyers, Director, OAQPS (June 3, 1983) (listing these two and several other NSPS's OMB was holding at that point). The beverage can rule was published on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

[354] *See supra* note 350; EPA first delivered the rule to OMB on June 29, 1981. The rule was vetoed on August 19, 1981; a revised rule was vetoed on April 28, 1983.

OMB has asserted that the NSPS's are not cost effective at the levels EPA sets, and that the standards are too prescriptive and should be more flexible.[357] As a different matter, OMB held the stationary internal combustion engine NSPS for two years, essentially because of disagreement with EPA over what constitutes a "significant" source under the Clean Air Act.[358]

The beverage can surface coating NSPS review[359] illustrates how OMB may act as a conduit from industry to EPA. OMB logged in the final rule from EPA in May 1982; it took well in excess of a year to be reviewed.[360] OMB's vigorous resistance was puzzling since the rule involved "basically no net control costs" to the overall industry, although certain operators would be subject to higher control costs.[361] EPA officials began to suspect industry influence.[362] Their suspicions were confirmed when OMB sent to EPA a detailed six-page memorandum, complete with charts and figures, absent from the docket, criticizing the rule and "mouth[ing] verbatim the industry position."[363] Industry lobbying of OMB on the can coating rule did indeed take place; OMB received a thick package of documents, some not in the EPA docket,[364] and some several months after the close of the comment period.[365]

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[355] *See* OMB Response to House Questionnaire, *supra* note 83 (Question 15), *reprinted in Hearings*, *supra* note 83, at 980-81.

[356] E.O. 12,291, *supra* note 1, § 8(a)(2) ("The procedures prescribed by this order shall not apply to. . .[a]ny regulation for which consideration. . .under the terms of this Order would conflict with deadlines imposed by statute. . . .").

[357] Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. OMB also expressed its concern that "two-tiered" standards, setting two different allowable emission levels for sources within the same category according to the control technology used, are anticompetitive and undesirable. *Id.*

[358] Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. The internal combustion engine NSPS was proposed July 23, 1979, 44 Fed. Reg. 43,152 (1979); the final rule was rejected twice by OMB, *see supra* note 350. EPA officials complain that OMB has no authority even under the Executive Order's broad mandate to make expert technical judgments such as whether a source is "significant"; they argue that costs and benefits have little to do with OMB's intervention, for the rule is highly cost effective. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

As another example of OMB attempts to encroach on decisions clearly appropriate for EPA's expert judgment, see A. Fraas, OIRA Regulatory Analyst, Reasonable Control Costs for Hydrocarbon Emissions (December 1, 1982) (memorandum to OIRA Adm'r DeMuth) (copy on file with author). This memorandum, transmitted to EPA, suggests that "EPA's suggested incremental cost cut-off of $1,900 per ton" of NSPS hydrocarbon emission reduction is unreasonably high, and strongly hints that OMB should adopt a cut-off of $1,000 or less per ton. EPA officials suggest that such a cut-off mandate by OMB would be a clear usurpation of the Agency's authority to set standards at the level it determines is reasonable. Interviews with EPA, OSR Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

[359] The proposed NSPS for beverage can surface coating appeared at 45 Fed. Reg. 78,980 (1980). The final rule was published—after receiving congressional attention—on August 25, 1983. 48 Fed. Reg. 38,728 (1983).

[360] Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C.

To summarize OMB review of EPA's NSPS program: (1) OMB has extended review well beyond the statutory deadline;[366] (2) OMB has not confined its comments solely to criteria mandated by E.O. 12,291; (3) OMB has exercised de facto veto power over some rules by holding them in "rule review limbo"; and (4) amid industry lobbying at OMB, the Office has made arguments that in some cases track industry positions verbatim.

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[361] Interview with EPA, Office of Standards & Regulations Official "E" in Washington, D.C. (June 6, 1983).

[362] *Id.*

[363] *Id. See* Memorandum from Jim Tozzi, OMB, OIRA Deputy Adm'r, to Kathleen Bennett, former EPA Ass't Adm'r for Air, Noise & Radiation (Nov. 18, 1982) (on file with author). This memo was docketed on August 26, 1983, after the final rule already had been published in the Federal Register.

[364] OMB Response to Author's FOIA Request (June 13, 1983) (requesting all documents received by OMB from outside parties discussing, *inter alia*, the beverage can surface coating NSPS).

One letter from the Can Manufacturers' Institute to OMB's Tozzi, for example, notes: "As requested, we are enclosing the industry's recorded position." It goes on to update the industry data, suggest a proposed rule, and update arguments presented to EPA. Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm'r (Dec. 19, 1982) (on file with author).

[365] *See, e.g.*, Letter from Can Mfrs. Inst. to Jim Tozzi, OMB, OIRA Deputy Adm'r (Dec. 19, 1982); Handbook: Reasonably Available Control Technology for Beverage Can Surface Coating (Jan. 1983).

[366] On July 7, 1982, OMB finally rejected formally seven of the NSPS's. The flexible vinyl coating, metal furniture coating, coil surface coating, rotogravure printing, large appliance coating, beverage can coating, and tire manufacturing NSPS's were vetoed that day, according to OMB 1982 Report on 12,291, *supra* note 187, at 16. After extensive staff-level debate, EPA management met with OMB in October 1982 to hammer out an agreement. Interviews with EPA, Office of Standards & Regulations (OSR) Official "E" (June 6, 1983) and EPA, OSR Official "F" (June 8, 1983) in Washington, D.C. Finally, following much "wordsmithing" by OMB and several relatively minor changes, OMB began to slowly release the rules for promulgation. Most of the originally rejected rules now have been published. Interview with EPA, OSR Official "F" in Washington, D.C. (June 8, 1983). The following final NSPS's have been published: Large Appliance Surface Coating, 47 Fed. Reg. 47,778 (1982); Metal Furniture Surface Coating, 47 Fed. Reg. 49,276 (1982); Metal Coil Surface Coating, 47 Fed. Reg. 49,606 (1982); Rotogravure Printing 47 Fed. Reg. 50,644 (1982); Beverage Can Surface Coating, 48 Fed. Reg. 38,728 (1983). The NSPS proposals for petroleum dry cleaners and rubber tire manufacture were published at 47 Fed. Reg. 56,118 (1982) and at 48 Fed. Reg. 2676 (1983), respectively. As of this writing, the internal combustion engine NSPS has yet to be promulgated. [Federal Regulations] 1 Env't Rep. (BNA) 121:0391 (Nov. 2, 1984).

NSPS's are issued pursuant to the Clean Air Act, which explicitly provides that all draft rules sent to OMB must be docketed prior to a rule's promulgation.[367] OMB comments are required to be docketed as well.[368] At the least, the Act directs that no rule may be based "in part or whole" on "any information or data which has not been placed in the docket,"[369] a command which would seem to require docketing of significant OMB comments. EPA's docketing practices appear to fall far short of the Act's mandates. At least five of the eleven NSPS dockets fail to include any reference to OMB's veto of the rule or to the accompanying written materials from OMB, and most of the dockets include absolutely no indication of OMB's extensive input into the rules.[370]

3. *National Ambient Air Quality Standard for Particulate Matter*

The Clean Air Act charges EPA to develop health-based standards for ambient air concentrations of certain pollutants, which

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[367] 42 U.S.C. § 7607(d)(4)(B)(ii) (1982) provides:

> The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

[368] *Id.* ("all written comments thereon by other agencies" as meaning all agencies other than EPA).

[369] *Id.* § 7607(d)(6)(C).

[370] *See* EPA Docket A-80-06 (large appliance surface coating NSPS) (no reference to OMB input, despite OMB's extensive input into the rules and its written veto of the rule in July 1, 1982); EPA Docket A-80-02 (petroleum dry cleaners NSPS) (no reference to OMB input, although OMB extensively criticized the EPA rules); EPA Docket OAQPS-79-05 (internal combustion engine NSPS) (the docket includes four internal EPA memos which make brief reference to OMB's problems with the rule; *see* docs. IV-H-1, IV-H-2, IV-H-3, and IV-H-4. Neither of the two letters from OMB vetoing the rule is docketed. *See supra* note 350.); EPA Docket A-79-47 (metal furniture surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking); EPA Docket A-80-05 (metal coil surface coating NSPS) (no reference to OMB's return of the rule or input into the rulemaking).

Only the internal combustion engine docket, OAQPS-79-05, even refers to OMB's review. *See supra* notes 364-65 and accompanying text regarding the beverage can docket. (All dockets located in EPA Docket Room, Washington, D.C.).

"in the judgment of the Administrator . . . allow . . . an adequate margin of safety . . . to protect the public health."[371] The D.C. Circuit has emphasized the statutory command that these National Ambient Air Quality Standards (NAAQS's) are to be solely health based, and that health protection may not be compromised to reduce compliance costs.[372]

However, soon after EPA began reconsidering its NAAQS for particulate matter, discussion between OMB and EPA ensued as to whether EPA should prepare an RIA. Ultimately, EPA agreed to hire a contractor to assess the costs and benefits of regulatory alternatives.[373] In December 1983 EPA filed a formal draft RIA for the standards, and docketed a cost-benefit analysis of alternative standards.[374]

Some industry representatives, particularly the American Iron and Steel Institute (AISI), favor a relaxation of the particulate matter NAAQS. The original draft of the contractor study, however, indicated that *tightening* the standard, rather than *loosening* it, would create the greatest net societal benefit.[375] Industry attacked the contractor study when this result was revealed.[376]

OMB also has criticized the study, objecting in detail to several of the studies upon which it relies.[377] EPA's former Chief of Staff complained that during the NAAQS review, OMB "kept urging upon us consideration of the costs through certain types of analyses that really were not permitted . . . under the statute."[378] Vice President Bush himself, apparently prompted by communications from Bethlehem Steel, joined OMB's effort to impress upon EPA the steel industry's concern that the standards not produce undesirable economic impacts.[379]

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[371] 42 U.S.C. § 7409(b)(1) (1982).

[372] *See* American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981); Lead Industries Ass'n v. EPA, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980).

[373] Telephone interview with EPA, Office of Policy & Resource Management Official "I" (May 31, 1983).

[374] *See* EPA, Regulatory Impact Analysis on the National Ambient Air Quality Standards for Particulate Matter (Dec. 1983); Argonne National Laboratory, Costs and Air Quality Impacts of Alternative National Ambient Air Quality Standards for Particulate Matter (Jan. 1983) (Technical Support Document prepared for EPA). EPA states in the preamble to its proposal: "Neither the draft RIA nor the contractor reports have been considered in issuing this [NAAQS] proposal. The Administrator has not seen these documents nor has he been briefed on their contents." 49 Fed. Reg. 10,408, 10,421 (1984).

[375] Interview with EPA, Office of Policy & Resource Management Official "J" in Washington, D.C. (May 27, 1983).

[376] AISI went so far as to argue: "[W]e seriously question whether an RIA is required. . . .EPA has uniformly interpreted Executive Order 12291 as requiring an RIA only when there is an *adverse* impact on industry, which would not be true in this instance. Since a proper revised standard would be somewhat less stringent than the present standard, there would be no adverse impact on industry." Letter from E.F. Young, AISI, Vice President, Energy and Environment, to Richard Morgenstern, EPA, Office of Policy Analysis (Oct. 29, 1982), EPA Docket A-79-29, Document II-D-87, attachment (original emphasis) (located in EPA Docket Room, Washington, D.C.). *Cf. supra* note 278 (EPA drafted no RIA for hydrocarbon NAAQS revocation because the revocation would not increase regulatory compliance costs).

[377] Interview with EPA, Office of Policy & Resource Management Official "J" in Washing-

The EPA docket for this rule revision contains the correspondence to and from the Vice President. There is, however, no record of communications between OMB and the steel industry, or of OMB's input into the rule.[380]

IV. JUDICIAL AND LEGISLATIVE REMEDIES TO PRESERVE THE INTEGRITY OF INFORMAL RULEMAKING

The measures proposed below are intended to further the rationality of, public accessibility to, and accountability for informal rulemaking. Under existing law, much can be accomplished by holding OMB to the terms of the Executive Order, protecting agency authority and enforcing comment docketing requirements. Given the unsettled state of ex parte contacts law, though, legislative codification of a docketing requirement may be desirable. In addition, Congress should create a separate rule review authority, with codified procedures. Divesting OMB of this authority would protect agency decisionmaking from the considerable political influence which OMB exerts during E.O. 12,291 review.

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ton, D.C. (May 27, 1983).

[378] *Daniel Testimony, supra* note 46, at 81.

[379] A letter dated December 13, 1983, from Walter F. Williams, President and Chief Operating Officer of Bethlehem Steel, to Vice President Bush notes that if EPA were to adopt a stringent NAAQS for particulate matter "we would have no option but to oppose the proposal." A December 16, 1983, cover letter to the Vice President from Rep. Lyle Williams of Ohio, enclosing the Bethlehem Steel letter, notes that the Congressman was "most fearful that the proposal of the wrong standard would jeopardize the modernization of the U.S. Steel Industry and, if that be the case, then we in government would be prolonging unemployment in the industry." Rep. Williams notes that while "EPA is not to consider economics, [certain standards] could be handled financially by the industry and thus not jeopardize modernization."

A December 20, 1983, letter from the Vice President to Walter Williams at Bethlehem Steel states, "I appreciate your thoughts on this [NAAQS] issue and have shared your letter with Bill Ruckelshaus." The Vice President also noted that a meeting with Bethlehem officials on the issue was to be arranged. (All letters on file with author; also available in EPA Docket A-79-29, docs. II-B-23, located in EPA Docket Room, Washington, D.C.)

[380] EPA Docket A-79-29 (located in EPA Docket Room, Washington, D.C.); *id.*, docs. II-B-23.

A. Judicial Remedies

1. Preserving Congressionally Delegated Agency Authority

As this study[381] and congressional investigators[382] have asserted, OMB is able to substantially influence regulatory decisions delegated by Congress to the expert judgment of the EPA Administrator. This can constitute an impermissible shift of authority from the Administrator to the new "superagency," OMB. Neither E.O. 12,291[383] nor any congressional authorization[384] supports such a shift; the courts should prevent it.

To assure the integrity of regulatory decisionmaking, the courts need not insist on a hermetic seal between the agency and OMB. Interagency discussion to secure coordinated execution of the law, as advocated in *Sierra Club*,[385] can be accomodated. However, when OMB's influence becomes supervisory rather than advisory, the court must step in to protect the agency's statutory delegation of authority.[386]

In construing specific statutory delegations of authority to the EPA Administrator, the reviewing court should determine congressional intent regarding the role of technical expertise in the decisionmaking. The court's analysis should also be informed by a careful review of EPA's 1970 mandate,[387] and by Congress' longstanding view of EPA as a quasi-independent expert agency.[388]

Where Congress states the specific factors to be considered in rulemaking, an agency decision influenced by other factors is improper and likely judicial grounds to strike down the rule.[389] The reviewing court must ensure that OMB review under E.O. 12,291 does not effectively insert non-statutory factors into EPA's decisionmaking calculus. In particular, it should forbid review where a rule is required by statute to be based on specified, non-economic criteria. The Executive Order contemplates this limitation, providing for OMB review only to the extent permitted by law.[390]

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[381] *See supra* text accompanying notes 201-53; 326-80.

[382] *See, e.g.*, Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 12, 282-94.

[383] *See supra* note 1, § 3(f)(3).

[384] *See supra* notes 100-03 and accompanying text.

[385] Sierra Club v. Costle, 657 F.2d 298, 406 (D.C. Cir. 1981); *see supra* text accompanying note 40.

[386] *See supra* text accompanying notes 73-81.

[387] EPA was created pursuant to Reorg. Plan No. 3 of 1970, *supra* note 76.

[388] *See supra* notes 78-80.

[389] *See supra* notes 104-18 and accompanying text; *see also* note 148.

In the end, the reviewing court should keep in mind the Supreme Court's admonition, "[I]f the word discretion means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to *his own understanding and conscience*."[391] Thus, where a statute expressly commits a decision to the expert judgment of the agency administrator, the presumption should be that Congress intended to have the administrator make that decision free from OMB pressure.

2. *Restricting Ex Parte Contacts*

Responding to judicial and public concern, EPA Administrator William Ruckelshaus instituted a policy requiring all rule-related written communications received by EPA from outside parties and summaries of all substantial rule-related oral contacts to be docketed.[392]

OMB's comments to EPA are at least as appropriate for docketing as are those of outside parties. The Office asserts: "We believe that *all* of our comments [on rules] are significant."[393] In fact, OMB comments often are remarkably influential on the shape of EPA rules; this argues strongly for their disclosure on the record for public and judicial scrutiny.

OMB argues that in order to have frank, candid and open policy discussion with agencies, its communications generally should be off the record.[394] This, of course, does not rebut a requirement to disclose communication of *factual* materials.[395]

Even policy-oriented discussions, conducted at the lower staff levels, would not seem to merit exemption from the APA's requirement that the public and the courts be informed of the basis of agency actions. Former EPA Administrator Douglas Costle has suggested that where OMB staff are acting in their day-to-day role as overseers, they must yield any presumed mantle of executive privilege.[396] Withholding the privilege for staff-level contacts does not conflict with *Sierra Club v. Costle*,[397] with executive privilege case law,[398] or with the *Vermont Yankee* proscription of judicially created, non-statutory procedural requirements.[399]

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[390] *See, e.g.*, E.O. 12,291, *supra* note 1, §§ 2, 6(a), 7(e), 7(g).

[391] United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266-67 (1954) (emphasis added).

[392] Ruckelshaus memorandum, *supra* note 304.

[393] OMB Response to House Questionnaire, *supra* note 83 (Question 8), *reprinted in Hearings*, *supra* note 83, at 976 (emphasis added).

[394] *See, e.g.*, *id.* (Questions 10, 11), *reprinted in Hearings*, *supra* note 83, at 977-79.

[395] ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) recommends docketing of factual contacts between executive office staff and agencies.

The reviewing court should apply principles of ex parte contacts doctrine[400] to OMB contacts during E.O. 12,291 rule review. Specifically, the court should require that:

> 1. All written material received by OMB from outside parties regarding a rulemaking be placed in the agency's rulemaking docket.
>
> 2. All substantial oral communications between OMB and outside parties going to the merits of a rule be summarized and placed in the agency's rulemaking docket.
>
> 3. OMB be prohibited, after the comment period closes, from discussing the rulemaking with parties outside the federal government.
>
> 4. OMB-agency communications, if written, be docketed by the agency; oral communications, if going to the merits of a rule or if merely "conduit" communications,[401] be summarized and

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[396] Interview with Douglas Costle, former EPA Adm'r, in Washington, D.C. (Aug. 17, 1983).

[397] 657 F.2d 298, 404-08 (D.C. Cir. 1981). As discussed *supra* notes 173-78 and accompanying text, *Sierra Club* held that a strictly policy-oriented meeting involving the President himself and the EPA Administrator need not be docketed. However, as has been pointed out by Professor George Eads and others, the *Sierra Club* opinion cannot be used to justify cloaking in secrecy OMB-EPA staff level contacts. *See Hearings*, *supra* note 83, at 1138 (testimony of George Eads) ("I was amused to. . .see the Reagan Administration attempt to cloak their oversight process with [*Sierra Club*]. . . .[W]ere the Reagan administration to have adopted the procedures that Judge Wald found acceptable in *Sierra Club* and adhered to them in both spirit and letter, much of the controversy that its oversight program has generated would have been avoided."). The *Sierra Club* court was reviewing an EPA record which included docketed summaries of *all* of the interexecutive meetings, save the presidential meeting, 657 F.2d at 404, and specifically noted that all contacts upon which the agency relied had been docketed, *id.* at 408 & n.529.

[398] *See supra* text accompanying notes 179-86 (arguing that executive privilege case law should be read to protect only interexecutive policy-oriented meetings at the very highest levels of government, e.g., President-EPA Administrator meetings).

[399] *Vermont Yankee* certainly does not speak against judicial insistence that agencies comply with the APA's fundamental requirement to make available to the public the comments it receives, to fully explain the basis of its regulatory decisions, and to supply the reviewing court with an adequate record of the agency decision. *See, e.g.*, Motor Vehicles Mfr's Ass'n v. State Farm Mutual Auto. Ins. Co., 103 S.Ct. 2857 (1983) (agency must explain fully the bases for regulatory decisions); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[400] *See supra* text accompanying notes 140-59.

[401] *See supra* text accompanying notes 305-11.

docketed.[402]

Because of OMB's lack of technical sophistication and industry's influence on OMB decisionmakers, a reviewing court aware of extensive OMB-industry contacts during an agency rulemaking may wish to temper the traditional judicial deference to agency expertise.[403]

Docketing of ex parte communications is needed to preserve the agency's decisionmaking integrity.[404] Docketing enables non-parties to the communication to rebut its substance, resulting in more reasoned decisionmaking. This rationale is fundamental to the APA's informal rulemaking procedures.[405] Furthermore, docketing is necessary to convey to the reviewing court an accurate portrait of the facts and arguments before the agency during the rulemaking. Only in this way can the court take the "hard look" required to determine agency rationality. Finally, advocates of centralized review who argue that OMB rulemaking input is necessary to ensure bureaucratic accountability must recognize the need for disclosure of OMB's review process and contacts with outside parties. Only with such disclosure may OMB be held accountable for its decisions and for the forces influencing these decisions.

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[402] *Cf.* ACUS Recommendation 80-6, 1 C.F.R. § 305.80-6 (1984) (recommending docketing of all conduit contacts, and of material factual information transmitted by Executive Office of the President staff to agencies; the recommendation also urges agencies to "consider the importance" of allowing rebuttal of important new issues or data presented in intraexecutive communications).

[403] *See* Environmental Defense Fund v. Blum, 458 F.Supp. 650, 659 (D.D.C. 1978):

> The agency's technical expertise is normally given prevailing weight, because the procedures prescribed by the APA create a sense of confidence in the result by reason of the fact that they insure interested parties a full opportunity to make submissions and respond to comments already made. Such confidence, however, cannot result if this full opportunity is denied, as where pertinent communications are received in secret by the agency.

[404] In Oversight Subcomm. Report on Executive Privilege, *supra* note 79, at 17, a key House subcommittee with jurisdiction over EPA recommends that OMB and all federal agencies insure that all regulatory review communications under E.O. 12,291 be in writing and be docketed. The report further recommends that OMB maintain a public file identifying all contacts with outside parties about regulations subject to review under E.O. 12,291, and include in the file a written summary of each such contact. Finally, the report recommends that OMB maintain a public file containing all written material provided to OMB on regulations reviewed under E.O. 12,291.

[405] *See* Administrative Procedure Act, 5 U.S.C. § 553 (1982).

B. Statutory Remedies

1. Congressional Authorization of Executive Review

Remedial legislation would be the most effective solution to OMB encroachment on agency discretion. For example, Representative Sam Hall's regulatory reform bill in the 98th Congress would have codified OMB review of agency regulations, while making it clear that the OMB Director would not have been permitted to "participate in any way in deciding what regulatory action, if any, the agency will take."[406]

This legislation would be helpful. The careful student of E.O. 12,291 review would doubt, however, whether such a limitation on OMB's authority would be effective in light of the Office's broad powers over agencies, and the opportunity for *sub rosa* influence. Practically speaking, OMB "suggestions" often may become directives due to the Office's extensive powers.

A more effective approach to limiting unwarranted OMB influence would be to establish a more objective and open review authority wholly separate from the Office. Such an independent review board could be statutorily required to conduct its reviews on the record, to accept comments on the record from all persons, to avoid consideration of non-statutory criteria, to not displace agency authority, and to review only "major" rules of national importance.[407] Any disagreement between this board and an agency could be followed by notification of Congress and resolution on the public record by the President, in accord with the regulatory reform statute's procedures. Only with objective overseers of the regulatory process, full disclosure, and congressional notification of "appeal" to the President can the goals of regulatory reform—full accountability of the bureaucracy and improved, unbiased regulatory decisionmaking—be achieved.

Any generic regulatory reform package codifying some form of executive review of rules should make the terms of such review as clear as possible. Such legislation should make it clear that authority statutorily delegated to an agency may not be displaced by the review board, that only informal regulations and not settlement agreements or more formal proceedings may be reviewed, and that only statutorily enumerated factors may be considered during review. Rules issued pursuant to statutory provisions precluding economic considerations or enumerating only non-economic bases for decision should not be reviewed.[408]

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[406] H.R. 2327, 98th Cong., 1st Sess. § 101(b) (1983) (proposed new 5 U.S.C. § 624(a)).

[407] *Cf.* ABA Comm'n on Law and the Economy, *supra* note 2 (recommending procedurally limited presidential oversight of rulemaking).

2. *Codification of Ex Parte Contacts Doctrine*

Although current judicial intepretation of the APA and the due process clause can be invoked by the court to require docketing of significant OMB-industry communications and most OMB-agency contacts of substance, this result is not assured. No court has ruled squarely on the requirements for docketing of significant OMB-industry or OMB-agency contacts.[409]

Therefore, to be certain that the public participation requirements and the judicial review provisions of the APA retain vitality, Congress should clarify the docketing requirements for OMB-industry and OMB-agency ex parte contacts. If Congress wishes to allow OMB rulemaking review to continue, it should at a minimum codify requirements that: (1) all written comments and all formal or informal drafts of rules passed between OMB and the agency be placed in the docket; (2) significant oral OMB-agency contacts addressing the merits of the rules be summarized and docketed; (3) all significant oral contacts between OMB and private parties be summarized and docketed, and all written OMB-private party contacts be docketed, at the rulemaking agency; and (4) post-comment-period contacts between OMB and outside parties on a rule's merits be forbidden, absent reasonable notice and opportunity for opposing interests to rebut. No recent regulatory reform bill would require such extensive "sunshine"; without it, however, we can only expect less accountable government and further erosion of the foundations of the APA.[410]

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[408] *See generally* Sunstein, *supra* note 2; *supra* notes 260-66 and accompanying text.

[409] *See supra* notes 160, 172 and accompanying text.

[410] Bills requiring docketing only of written interagency communications fail to recognize that the vast majority of substantial interagency contacts are oral, and fail to account for the conduit contact. *See, e.g.*, H.R. 2327, 98th Cong., 1st Sess. § 101(c) (1983) (proposed new 5 U.S.C. § 624(c)) (all *written* comments on rules by Director of OMB must be docketed); H.R. 3939, 98th Cong., 1st Sess. § 102 (1983) (proposed new 5 U.S.C. § 553(c)(2), (f)(1)(D) & (f)(1)(E)) (all written material from agency to OMB, and any "document" [presumably including OMB comments] containing "significant factual material of central relevance to the rulemaking," must be docketed; all changes in draft rules "which respond to" OMB comments must be explained on docket); S. 1080, 98th Cong., 1st Sess. § 3 (proposed new 5 U.S.C. § 553(d)(2), (f)(1)(B), (f)(1)(F), & (f)(1)(G)) (essentially the same as H.R. 3939's docketing provisions, but requiring docketing of "copies of *all* written comments") (emphasis added).

V. CONCLUSION

The twin goals of an executive regulatory oversight process should be to increase the accountability to the public of a sometimes unresponsive bureaucracy, and to ensure better, more impartial reasoning in rulemaking. Measured by these yardsticks, OMB review under E.O. 12,291 has been a failure. While OMB review has sometimes succeeded in encouraging agencies to bring their policies into line with the thinking of the Office's staff, OMB has not, for the most part, increased the accountability or rigor of analysis of the rulemaking process.[411]

The Office's propensity for secrecy and insistence on keeping its critiques of rules oral undermine the accountability of the regulatory decisionmakers. OMB's anti-regulatory bias, and the preferential access to Office staff enjoyed by industry, further erode the values of accountability to the public and reasoned government decisionmaking on the merits. The APA's public participation and judicial review provisions are hampered by off-the-record OMB review, and the rationale for the judicial doctrine granting expert agencies substantial deference is severely undercut by secret OMB pressure. Furthermore, congressional delegations of power to specific repositories of expertise—such as EPA—are violated by OMB influence on or control of rulemaking.

If some form of executive oversight of the rulemaking process is desired, oversight authority should be delegated to a body other than OMB. Congress and the courts should ensure that the review is above board, unbiased, on the merits, and observant of the letter and spirit of all relevant statutory requirements; OMB to date has not demonstrated that it can fulfill these goals.

Editor's Note:

On January 4, 1985, President Reagan signed Executive Order 12,498[412] which, by its terms, will increase significantly OMB authority over agency regulatory activity. Under E.O. 12,498, all heads of executive agencies subject to the Order "shall ensure that all regulatory actions are consistent with the goals of the agency

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[411] *But see* GAO Report on Cost-Benefit Analysis, *supra* note 248 (concluding that despite the limitations of cost-benefit analysis, some major rules which were accompanied by an RIA were improved by the E.O. 12,291 requirements; noticeably absent from the GAO report, however, is any praise for OMB review of EPA rules). *Cf.* GAO Report on 12,291, *supra* note 24 (criticizing OMB E.O. 12,291 review).

[412] 46 Fed. Reg. 1036 (1985) [hereinafter cited as E.O. 12,498].

and of the Administration."[413] The Order is aimed, *inter alia*, at thwarting regulatory actions contrary to administration policies before they even are initiated by the agencies. OMB is authorized to implement the Order,[414] and likely will attempt to structure agencies' regulatory priorities, much as it structures their budgetary priorities,[415] only here without congressional or public review.[416]

Under E.O. 12,498, each agency subject to E.O. 12,291 must develop a "Regulatory Program" laying out "all significant regulatory actions . . . planned or underway, including . . . the development of documents that may influence, anticipate, or could lead to the commencement of rulemaking proceedings."[417] OMB determines whether the Program is consistent with the "Administration's policies and priorities,"[418] and may include further regulatory or deregulatory actions.[419] A regulatory action absent from the Regulatory Program, or materially different from an action described therein, shall not go forward without OMB approval, unless an emergency exists or a statutory or judicial deadline applies.[420] OMB may, "to the extent permitted by law, return for reconsideration" any such rule.[421]

E.O. 12,498 is less restrained in its grant of power to OMB than is E.O. 12,291. OMB is authorized to implement the Order only "to the extent permitted by law,"[422] but this is a vague limitation given OMB's authority to review and revise agency Regulatory Programs[423] and delay agency action on rules absent from the Regulatory Program or materially different from an action described therein.[424] The requirement of agency heads that all regulatory actions be consistent with administration policies is not expressly delimited by existing law.[425]

Furthermore, unlike E.O. 12,291, E.O. 12,498 fails to require that even formal OMB "vetoes" of potential regulatory activities be divulged to the public.[436] Again unlike E.O. 12,291,[437] the Order fails to stipulate that its provisions shall not be construed as displacing discretion vested by law in an agency other than OMB. The broad provisions of E.O. 12,498, and the noticeable lack of limits placed on OMB authority, likely will expand OMB's power to supervise, off the public record, virtually all agency activity, however tenuously related to future regulation.

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[413] *Id.* § 1(b) (emphasis added).

[414] *Id.* § 4.

[415] *See supra* note 7 and accompanying text.

[416] *See supra* note 225 (noting that OMB was likely to seek such power).

[417] E.O. 12,498, *supra* note 412, § 2(a).

[418] *Id.* § 3(a)(i).

[419] *Id.* § 3(a)(ii).

[420] *Id.* § 3(c).

[421] *Id.* § 3(d).

[422] *Id.* § 4.

[423] *Id.* § 3(a), (b).

[424] *Id.* § 3(c).

[425] *See id.* § 1(b).

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[436] *Compare id.* § 3(d) *with* E.O. 12,291, *supra* note 1, § 3(f)(2).

[437] *Supra* note 1, § 3(f)(3).